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No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
PETITIONER,

v.

BRENTWOOD ACADEMY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Tennessee Secondary School Athletic Association is a voluntary association, composed primarily of public schools, which adopts rules governing athletic competition between its members. Brentwood Academy is a private school that voluntarily chose to join TSSAA and agreed to abide by its rules, but now claims a First Amendment right to continue competing while violating TSSAA's rule against the use of "undue influence" in recruiting students for athletic purposes. The Sixth Circuit agreed, reasoning that Brentwood's voluntary agreement is irrelevant to the constitutional analysis and declining to recognize any substantial state interest in fair and level athletic competition. The question presented in this case is:

Whether the Sixth Circuit correctly held, in conflict with decisions of this Court and other courts of appeals, that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when it imposed contractual penalties for violations of the recruiting rule that Brentwood agreed to follow?

LIST OF PARTIES

In the court of appeals, the plaintiff/appellee was Brentwood Academy, and the defendants/appellants were the Tennessee Secondary School Athletic Association and its Executive Director, Ronnie Carter, both in his official and personal capacities.

RULE 29.6 STATEMENT

Petitioner Tennessee Secondary School Athletic Association does not have a parent corporation, and no publicly held company owns 10% or more of Tennessee Secondary School Athletic Association's stock.

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JURISDICTION

The Sixth Circuit denied the Tennessee Secondary School Athletic Association's petition for rehearing and rehearing *en banc* on June 27, 2006 (Pet. App. 154-155). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides that "Congress shall make no law ... abridging the freedom of speech." The Fourteenth Amendment to the Constitution provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Tennessee Secondary School Athletic Association's ("TSSAA") member schools have agreed that one of the rules for their high school athletic league should be a mutual agreement not to use "undue influence ... to secure or to retain a student for athletic purposes." Pet. App. 162-63.[1] High school athletic associations in every other state have similar rules, because there is a broad consensus among educators that recruiting for athletics harms students and undermines the educational purposes of high school sports. The recruiting rule also plays an important role in maintaining a fair and level playing field. It may limit "speech" in a sense, but so does the rule that a coach too vigorously protesting a referee's call will be ejected. Respondent Brentwood Academy voluntarily chose to join TSSAA and promised to respect its rules, and then

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[1] "Pet. App." refers to the petitioner's appendix filed in this Court. "CAJA" refers to the joint appendix filed in the court of appeals.

committed several clear and intentional violations of the recruiting rule. After TSSAA imposed a sanction, Brentwood initiated a decade of constitutional litigation claiming that its violations should have been treated as a case of "no harm, no foul." It claims, in essence, to have a constitutional right to compete in TSSAA-sponsored tournaments without following the rules that set the terms of competition, and victory, for others.

The Sixth Circuit found a constitutional violation only by making several serious errors that conflict with decisions of this Court and other courts of appeals, and merit review.

Factual Background

Interscholastic athletic competition requires a common set of rules to establish, define, and coordinate competition. TSSAA is a voluntary membership organization through which members self-regulate their sports competition and establish common rules to promote the educational ideals of interscholastic athletics. CAJA 119-120. TSSAA's members are predominantly public schools, *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*"), but private schools that agree to abide by TSSAA's constitution and bylaws are also permitted to join. Not all schools in Tennessee subscribe to TSSAA's particular philosophy. Members have terminated their relationships with TSSAA to pursue different objectives, and many private schools in Tennessee join other athletic associations with different values and different rules. CAJA 868-71, 574.

TSSAA's authority over its members derives exclusively from each member's annual, voluntary decision to participate in TSSAA and comply with its bylaws by executing a membership contract. CAJA 871-72, 574. This Court has held that TSSAA is a "state actor" due to its "entwinement" with its public school members, *Brentwood I*, 531 U.S. at 298, but the Tennessee legislature has never delegated any legislative, judicial, or executive power to TSSAA, nor granted it any official authority. Neither the Tennessee State Board of Education nor the principals of

public schools—the sources of this Court's "entwinement" rationale—have any authority over Brentwood's athletic program except by virtue of Brentwood's voluntary membership contract with TSSAA.

Brentwood's Voluntary Participation in TSSAA

Respondent Brentwood Academy is a small private academy with a prominent athletic program. CAJA 118. Since joining TSSAA for the first time in 1972, Brentwood has won nine TSSAA state football championships, usually competing against much larger schools. CAJA 1154. Since the outset of this litigation, Brentwood has acknowledged that its relationship with TSSAA is contractual in nature. Brentwood's briefs to the district court invoked contract law and emphasized that "as a member of TSSAA, Brentwood Academy and other member schools have certain contract rights. Among those rights is the right to participate fully in the activities of the TSSAA unless there is some cause for a change in status." Brentwood Mem. at 60, No. 3:97-1249, Doc. No. 28 (M.D. Tenn. June 1, 1998).

Brentwood has likewise acknowledged that joining TSSAA is an entirely voluntary choice. CAJA 1406, 574. Brentwood Headmaster Emeritus Bill Brown testified:

> Q. And Brentwood Academy was not under any compulsion to join, it did so voluntarily, correct?
>
> A. Yes, sir.
>
> Q. All right. And when Brentwood Academy joined TSSAA, it agreed to abide by the rules and decisions of TSSAA, each year, right?
>
> A. Yes, sir.

CAJA 565. Current Headmaster Curt Masters agreed:

> Q. So you would agree with me that the decision of whether to join TSSAA or not join TSSAA each year is Brentwood Academy's decision to make, right?
>
> A. It is.
>
> *****
>
> Q. Now would you agree with me that if the public schools who predominate in TSSAA enact a set of

by-laws or rules to serve the public school mission, if Brentwood Academy's mission and those by-laws conflict, Brentwood Academy is free not to join those public schools in that association?

A. Yes.

CAJA 1406, 1410-11.

TSSAA's Recruiting Rule

TSSAA's bylaws contain a "recruiting rule" that prohibits "the use of undue influence ... to secure or retain a student for athletic purposes ...." Pet. App. 162-63. The bylaws contain several pages of guidelines that explain the rule's scope and application. *Id.* at 163-66. For example, the guidance warns that "a coach may not contact a student or his or her parents prior to his enrollment in the school," and cites as an example of prohibited conduct "any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete ...." *Id.* at 163-64. The guidance also defines "enrolled" as having "attended 3 days of school." *Id.* at 163-64. High school athletic associations in nearly every other state all have similar recruiting prohibitions.[2]

At trial, TSSAA gave three reasons for the rule: (1) preventing the exploitation of children; (2) ensuring that athletics remain secondary to academics; and (3) fostering a level playing field among its participating schools. TSSAA's evidence confirmed the importance of all three objectives. The NCAA first began permitting sports recruiting in 1956, and witnessed a pattern of abuses as well as a growing chasm between academics and athletics. CAJA 1665, 1339. At trial, four nationally renowned experts confirmed that schools must guard against this sort of exploitation of children. CAJA 1732, 1750, 1564, 1658, 1338. Brentwood's own expert acknowledged that preventing exploitation of children was a compelling interest. CAJA 1205.

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[2] The public internet sites of the state athletic associations are compiled at http://www.nfhs.org/custom/member_associations/states.aspx

The rule also helps preserve the primacy of academics over athletics. CAJA 1564, 657, 706. Otherwise the ills that have befallen the system of elite athletics at Division I colleges will filter to the high school level. CAJA 1569, 1604, 1609, 1661, 1338, 1351. Even Brentwood Headmaster Emeritus Bill Brown conceded that athletic recruiting is contrary to the purposes of high school sports and education, and should be prohibited. CAJA 607, 614.

TSSAA's recruiting rule also helps ensure fair and balanced athletic competition. Many different types of schools have come together to compete through TSSAA, and the entire enterprise depends on the ability to establish a reasonably level playing field. The evidence demonstrated that TSSAA's recruiting rule is essential to achieving that goal. CAJA 1728, 1564, 1571, 1306, 1311, 1324, 1086, 1102. Brentwood Headmaster Emeritus Bill Brown acknowledged that the recruiting rule protects a level of fairness in athletic competition that otherwise could not exist. CAJA 605, 615. According to Brown, without rules to prevent athletic recruiting, non-public schools that are not restrained by geographic attendance zones or dependent on limited tax revenues would have unfair competitive advantages over public schools. CAJA 615. The recruiting rule is therefore necessary to enable public schools and non-public schools to compete fairly within the same organization. Both the perception and reality of fairness and competitive balance are essential to the educational goals of high school athletics. As TSSAA expert witness Jack Roberts testified:

> If you do not have a level playing field, the competition cannot be fair, you can only have hard feelings result. All who participate want a fair chance to succeed .... The team doesn't want to be humiliated week after week by teams that are much more loaded in talent and powerful. ... There won't be as many youngsters coming out for the team. When that happens, schools lose a tremendous vehicle, sports, for reaching and motivating young people.

CAJA 1571-72.

Brentwood's Violation of the Recruiting Rule

In 1997, TSSAA received allegations about recruiting misconduct by individuals associated with Brentwood. CAJA 1025, 1437. Between May 30 and July 29, 1997, TSSAA Executive Director Ronnie Carter exchanged a series of letters and phone calls with Brentwood head football coach Carlton Flatt and Headmaster Brown about Brentwood's violations of TSSAA bylaws, and Carter and one of his assistants met personally with both Flatt and Brown. CAJA 1839, 1842, 1851, 1861, 1868, 618. On July 15, 1997, Brentwood provided TSSAA a copy of a letter Coach Flatt had sent to a dozen eighth-grade boys enrolled at other middle schools inviting them to attend spring football practice at Brentwood. Brentwood acknowledged that Coach Flatt had followed up those letters with personal telephone calls to the home of each boy. CAJA 1872, 1131. The boys had indicated an intention to attend Brentwood the next fall, but were not yet "enrolled" at Brentwood as defined in the bylaws. Every year some students change their minds before matriculating. CAJA 561-63, 582-84, 591.

The proof at trial was overwhelming that the invitation to spring practice was a recruiting endeavor that would tend to unduly influence the boys who received it. CAJA 1741, 1576, 1673, 1345, 1064. With the letter's references to "Your Coach" and "your new team," Coach Flatt effectively treated twelve boys as his own players, even though they were not yet Brentwood students. Flatt's implication that it would be in the child's best interest to attend spring practice sent the message that playing in the future depended on attendance at Brentwood's spring practice, even though the students were then enrolled at other schools. CAJA 1577, 1347. Such suggestions tend to have great effect because of the influence that coaches have on young student athletes. CAJA 1166, 1741. Coach Flatt himself acknowledged the coercive effect his letters had on the boys to whom they were sent. CAJA 1171-72.

Brentwood also provided TSSAA with information about Coach Flatt's provision of free tickets to a middle

school football coach that were in turn used by two prominent middle school athletes to gain free admission to a Brentwood football game, as well as information about violations of the TSSAA limit on off-season practice. CAJA 1138, 1851, 1150. Brentwood also responded to TSSAA requests for information about alleged Brentwood booster Bart King's contacts with potential Brentwood recruits. CAJA 1840, 1843, 1853-54, 1863, 1871, 1873-74.

TSSAA's investigation and adjudication complied with the procedures established in its constitution and bylaws and agreed upon by all members. The constitution provides that a school charged with violating TSSAA regulations "shall be notified of such charges," and "if a hearing is desired by the school involved ... [p]rovisions will then be made for such hearing." Pet. App. 156. Moreover, the constitution ensures that "a member school shall not be suspended from membership without first being given the opportunity to present its case at a hearing ... [which] shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control." *Id.* at 157. Finally, "any decision of the Executive Director may be appealed to the Board of Control." *Id.*

On July 29, 1997, Executive Director Carter made an initial determination that Brentwood had violated the recruiting rule and the TSSAA limitation on off-season practice. That determination was based on all of the incidents discussed by the parties, including the activities of Mr. King. CAJA 1844. With the aid of counsel, and in accordance with TSSAA's bylaws, Brentwood then appealed to Carter and an advisory panel of three TSSAA Board of Control members. At this August 13, 1997 appeal, Brentwood presented sworn statements from witnesses and made a lengthy presentation that addressed each violation. CAJA 1152, 621, 1477-78, 2508, 2707. Following that hearing, Carter modified his initial decision. CAJA 1848.

Brentwood then pursued a *de novo* appeal under TSSAA bylaws to the entire TSSAA Board of Control on August 23, 1997. Again represented by counsel, Brentwood made a

lengthy presentation that included live testimony of witnesses and sworn statements addressing each violation. CAJA 2707, 3084. Brentwood's attorney presented an affidavit from Bart King and a sworn statement from a student, Jacques Curry, about Bart King. CAJA 2812-14, 2967-71, 1482-83. Brentwood's attorney also brought Mr. King in person to the hearing, but did not call him to testify. CAJA 1477, 1479. Brentwood's attorney acknowledged having had ample opportunity to prepare for the hearing, and testified that he was not prevented from presenting anything he wished to present. CAJA 1477-85.

After hearing Brentwood's arguments, the Board of Control issued a new and final decision. The Board of Control found that Brentwood: (1) violated the Recruiting Rule as a result of Coach Flatt's letters and calls; (2) violated the Recruiting Rule by giving free tickets to a Brentwood football game; and (3) violated the Practice Rule in boys' basketball. CAJA 1830. Each finding was based upon information that Brentwood supplied to TSSAA. The Board of Control placed Brentwood's athletic program on probation for four years, excluded the boys' basketball and football teams from TSSAA tournament playoffs for two years, and assessed a $3,000 "fine." (TSSAA bylaws do not provide a mechanism to compel payment. CAJA 867.)

Brentwood felt the punishment was too severe, and filed this lawsuit, alleging that the recruiting rule violated its First Amendment rights and that TSSAA's enforcement of the rule violated both substantive and procedural due process.

Proceedings Below

On July 29, 1998, the district court granted partial summary judgment to Brentwood. The district court held that the recruiting rule was unconstitutionally vague and was a content-based restriction on speech that failed strict scrutiny. *Brentwood Acad. v. TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). The Sixth Circuit reversed, ruling that TSSAA did not act under color of state law. *Brentwood*

Acad. v. TSSAA, 180 F.3d 758 (6th Cir. 1999). This Court granted certiorari and reversed, concluding in a 5-4 decision that TSSAA was a state actor because of its "entwinement" with the State Board of Education and public schools. *Brentwood I*, 531 U.S. 288.

On remand to the Sixth Circuit, TSSAA argued that because of the contractual relationship between Brentwood and TSSAA, the *Pickering-Connick-Umbehr* line of cases, which governs retaliation against state employees or contractors because of speech, provided the appropriate analytical framework here. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996). Under that standard, TSSAA insisted that Brentwood's speech was not on a matter of public concern, and that application of the recruiting rule to Brentwood was reasonable in light of the rule's legitimate objectives.

The Sixth Circuit disagreed. It held that the voluntary and contractual nature of the relationship between Brentwood and TSSAA was relevant only to waiver—and that Brentwood had not knowingly and specifically waived its right to file suit for a perceived violation of its First Amendment rights. Pet. App. 7-8. The court briefly considered the potential relevance of *Umbehr* and *Pickering*, but held that the recruiting rule should instead be analyzed as a "time, place, and manner" restriction on speech subject to intermediate scrutiny. It reasoned that because TSSAA must prove that its recruiting rule serves important governmental interests, *Pickering*'s requirement that the speech must be on a "matter of public concern" was satisfied by definition. *Id.* at 9. It then remanded for trial under intermediate scrutiny. *Id.* at 14-15, 21-23.

The district court conducted a ten-day trial, and entered judgment in Brentwood's favor on January 13, 2003. The court acknowledged TSSAA's important interests in preventing exploitation of children and keeping athletics secondary to academics, but held that TSSAA's interest in promoting a level playing field was not as important, Pet.

App. 48-49, and that enforcement of the recruiting rule against Brentwood's particular actions was not narrowly tailored. *Id.* at 49-55. The court also ruled that TSSAA violated Brentwood's due process rights. *Id.* at 65-71.

On appeal, a divided panel of the Sixth Circuit affirmed in all relevant aspects. Pet. App. 107, 119-20. The panel majority held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual," *id.* at 94, and that the deferential analysis applied to the termination of public employees or contractors in cases like *Pickering* and *Umbehr* is limited to the particular types of contracts involved in those cases, *id.* at 91-93. It also treated this Court's distinction between "sovereign power" and "contractual power" in *Umbehr* as "dicta." *Id.* at 92-93. The panel held that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest ...." *Id.* at 100. It agreed that "TSSAA had substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes," *id.*, but held that "the TSSAA's use of its discretion to punish Brentwood for the letters and calls was not a narrowly tailored way to keep athletics subordinated to academics at Brentwood or ensure that the student athletes being contacted were not being exploited." *Id.* at 102. In addition, despite the evidence that Brentwood was fully aware of the issues involving Bart King and had received all the process it was due under its membership contract with TSSAA, the panel found a procedural due process violation because one member of TSSAA's Board testified that he considered the King matters in deciding on the penalty. *Id.* at 116-20.

Judge Rogers dissented, explaining that "[d]issatisfaction with application of game rules does not become a First Amendment violation merely because the rule involves speech." *Id.* at 132. Judge Rogers would have held that "Brentwood in this case gave up its right to

engage in certain types of speech," and noted that that waiver would have been respected in the Third, Fourth, and Ninth circuits. *Id.* at 134-36. He also explained that there was no "unconstitutional conditions" defect in Brentwood's agreement to abide by the recruiting rule, because that rule is reasonably related to the competitive athletic program overseen by TSSAA and because the "speech" in question—being purely a matter of private concern—clearly failed the *Pickering* test. *Id.* at 138-39. Judge Rogers also noted that the majority erred by second-guessing whether Brentwood's specific violation actually threatened the substantial state interests underlying that rule. "The anti-recruiting rules, like restrictions on an adult oriented business, operate in the aggregate and are judged based on the overall effect on speech; a city is not required to show that every cabaret affected by an ordinance causes an increase in crime and prostitution before the ordinance can be applied to that business." *Id.* at 144. Judge Rogers also disagreed with the majority's "remarkable" conclusion that competitive equity is not a substantial state interest: "it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." *Id.* n.2. Finally, Judge Rogers explained that the district court and panel clearly erred by concluding that Brentwood's procedural due process rights were violated. *Id.* at 147-48.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's analysis is flawed in at least three respects, each of which conflicts with this Court's precedents and the law of other circuits, and merits review.

First, the Sixth Circuit wrongly held that TSSAA's voluntary recruiting rule should be analyzed just like any "time, place, and manner" restriction on speech imposed involuntarily on members of the general public. It held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual."

Pet. App. 94. That is plainly incorrect. In *Snepp v. United States*, 444 U.S. 507 (1980), this Court enforced a CIA agent's voluntary agreement to submit any proposed writings to the agency for pre-publication review—a rule that if imposed on the general public would be a nakedly unconstitutional prior restraint. And in *Rust v. Sullivan*, 500 U.S. 173 (1991), and similar cases, this Court has held that the government may impose explicit conditions on the speech of voluntary participants in government programs, simply as a product of its right to control the limits and purposes of the program. Brentwood knew of this rule and voluntarily agreed to play by it, and the rule restricts Brentwood's "speech" only in the narrow context of its actual participation in the competitive athletic program it chose to join. That should be the end of the matter.

Even if Brentwood's specific voluntary agreement to abide by this rule were disregarded, this Court has held that when a state actor simply terminates its *contractual* relationship with a citizen because of that citizen's speech, First Amendment review is substantially more deferential than when the state exercises sovereign authority to punish speech with civil or criminal penalties. An employee or contractor who suffers termination or another contractual penalty because of speech has a First Amendment claim only if he spoke "as a citizen," "upon matters of public concern," and his interest in speaking is not outweighed by the government's interest in protecting the purposes and quality of its programs. *See, e.g., Umbehr*, 518 U.S. at 676; *Pickering*, 391 U.S. at 568. Several circuits have correctly held that when a voluntary association qualifies as a state actor, internal membership decisions raise constitutional concerns only if they violate the *Pickering* test. Brentwood cannot possibly succeed under that standard. The "speech" for which it was sanctioned here was delivered entirely in its capacity as a participant in the program administered by TSSAA, related solely to matters of private concern, and is not justified by any interest of Brentwood's sufficient to outweigh the undeniable need of TSSAA's member schools

to establish and enforce consistent rules for competition.

Second, even under its misguided "time, place, and manner" analysis, the Sixth Circuit improperly discounted the importance of TSSAA's interests. It held that TSSAA did not submit sufficient "evidence" to prove that promoting competitive equity is a "substantial" state interest. That holding is plainly wrong and in direct conflict with decisions of almost every other circuit and the highest courts of several states—all of which have recognized, without the need for evidentiary proof, that both the perception and reality of competitive equity are essential to the goals of interscholastic athletics. More broadly, the Sixth Circuit accepted two of TSSAA's substantial state interests for the recruiting rule but held that the rule should not have been enforced here because, in the court's substituted judgment, Brentwood's unambiguous violation was harmless. Second-guessing such judgment calls is not the business of a federal court. This Court has never required a government entity to prove that enforcement of a generally reasonable "time, place, and manner" restriction was justified by the particular facts of the case. And particularly in the athletic context, a referee or athletic association has a substantial interest in enforcing the agreed rules of a competitive endeavor *simply because they are the rules.* Referees sometimes look the other way when they believe that enforcement would not serve the rule's purposes, but no one has a constitutional right to such forbearance.

Third, the Sixth Circuit applied due process precedents developed in very different contexts to hold that the hearing TSSAA provided Brentwood was insufficient. That is incorrect and conflicts with the decisions of this Court and other circuits. The process Brentwood received was fully consistent with this Court's due process cases—and in any event was precisely the process it agreed to.

Finally, the Sixth Circuit's confusion illustrates why this Court's earlier decision in this case warrants reconsideration. *Brentwood I* created a new "entwinement" test for state action that lower courts and commentators

have repeatedly characterized as unworkable. It also involves the courts in the internal affairs of voluntary associations that do not threaten constitutional values.

On a practical level, there is no question that Tennessee has the right to decide how its own public schools will compete without any constitutional scrutiny. The real issue in this case is whether TSSAA (and its counterparts in all 49 other states and the District of Columbia) can continue to offer *private* schools like Brentwood the opportunity to participate in joint athletic tournaments on the condition that they agree to play by those same rules. Athletic associations like TSSAA are voluntary organizations funded by modest dues and ticket sales at high school tournament games. They do not have the resources for constitutional litigation or any incentive to risk it. This case alone—concerning a limited sanction for a clear recruiting violation—has dragged out for very nearly a decade. If allowed to stand, the Sixth Circuit's analysis will inevitably lead to the exclusion of private schools from associations like TSSAA. That will serve no one's interests.

I. THE SIXTH CIRCUIT'S FIRST AMENDMENT ANALYSIS IS WRONG AS A MATTER OF LAW AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The Sixth Circuit's Decision Fundamentally Misconceives First Amendment Doctrine

The Sixth Circuit treated TSSAA's recruiting rule just like a coercive "time, place, and manner" regulation of speech imposed by the State on the general public and subject to intermediate scrutiny, and held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual." Pet. App. 94. That is incorrect. Conditions attached to voluntary government programs are always reviewed with substantially more deference than coercive speech restrictions imposed on the general public.

TSSAA's enforcement of its recruiting rule was not an exercise of sovereign power. TSSAA has no power at all over Brentwood other than the power that Brentwood has voluntarily given it by contract. Brentwood is subject to TSSAA's recruiting rule only because it voluntarily agreed to that rule when it chose to join TSSAA, and because it wants to continue competing in TSSAA's tournaments in the future. Private schools have plenty of other leagues and outlets for competition, in Tennessee and nationwide. Many Tennessee private schools do not belong to TSSAA. As this Court explained in *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988), abandoning its membership in the NCAA may have been a blow to UNLV's particular aspirations for athletic glory, "[b]ut that UNLV's options were unpalatable does not mean that they were nonexistent."[3] *Id.* at 198, n.19. TSSAA is simply offering a discretionary benefit to Brentwood on the condition that Brentwood agree to abide by the basic rules that define, make possible, and preserve the very benefit being offered. This Court recognized in *NCAA v. Bd. of Regents*, that an athletic league "would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition." 468 U.S. 85, 101-02 (1984). The "integrity" of such rules "cannot be preserved except by mutual agreement." *Id.* at 102.[4]

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[3] *See also Grabow v. Montana High Sch. Ass'n*, 312 Mont. 92, 98-99 (2002) ("While the consequences may weigh on a district's decision to withdraw from the MHSA, the district still remains free to do so."); *Robinson v. Kansas State High Sch. Activities Ass'n*, 260 Kan. 136, 149 (1996) ("The fact that all member schools must agree to obey the rules governing interscholastic competition, whether or not they individually agree with those rules, likewise does not establish involuntariness.").

[4] *See also Grabow*, 312 Mont. at 98 ("Competitive interscholastic athletics requires rules for competition."); *Robinson*, 260 Kan. at 149 ("The nature of interscholastic competition demands that there be a set of rules all competing schools are willing to abide by. ... [A] school wanting to compete in sports or other activities with other schools will agree to abide by the rules they all agree on -- whether each school may like or dislike a particular rule.").

That feature takes this case entirely outside of the "time, place, and manner" precedents relied on by the Sixth Circuit. First, the government is free to establish up-front conditions on participation in voluntary government programs, so long as the conditions are reasonable and germane to the purposes of the program. *See Grove City Coll. v. Bell*, 465 U.S. 555 (1984). In *Snepp*, for example, this Court rejected a First Amendment challenge to a pre-publication screening condition contained in a government employment contract. This Court did not analyze the condition as a "time, place, and manner" restriction; rather, it appropriately viewed the rule as a simple and reasonable condition of employment, voluntarily accepted at the outset. And in cases like *Rust*, this Court has held that the government may require that voluntary participants in government programs abide by reasonable restrictions on their speech within the contours of that program. *Rust*, 500 U.S. at 193. Individual participants do not have the right to change the basic character of a voluntary government program by participating in that program in a manner inconsistent with its purposes. Reasonable restrictions on speech *within the program* are unproblematic, so long as they are not intended to suppress particular ideas and do not "effectively prohibit[] the recipient from engaging in the protected conduct [or speech] outside the scope of the ... program." *Id.* at 196. Like the counselors in *Rust*, Brentwood is free to say anything that it likes on the subjects of high school sports, recruiting, or TSSAA in a wide variety of contexts. *See* Pet. App. 11-12 (Sixth Circuit listing the "numerous ways in which Brentwood can get its message about athletics out to prospective students"). But "speech" by which Brentwood recruits individual students for athletic purposes is not abstract social commentary—it is active participation in the competitive athletic program offered and overseen by TSSAA, just like a coach's on-the-field challenge to a referee's penalty call. TSSAA is entitled to insist that participation in its own program be conducted consistent with that program's rules and purposes. *Rust*,

500 U.S. at 193; *cf. Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995) (voluntary participants in school athletics "have reason to expect intrusions upon normal rights and privileges").

Second, this Court has repeatedly held that the government may discipline or terminate any voluntary contractual relationship because of speech that disrupts the legitimate goals of that relationship. In such circumstances, review "must rest on different principles than review of speech restraints imposed by the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality). "[S]ubstantial weight" is given to the government's decisions as employer "even though when the government is acting as sovereign [this Court's] review ... is considerably less deferential." *Id.* at 673; *Umbehr*, 518 U.S. at 678 ("Deference is therefore due to the government's reasonable assessments of its interests *as contractor*.")

That principle applies across a broad spectrum of voluntary contractual relationships with the government. *Umbehr*, 518 U.S. at 680. The Sixth Circuit's observation that this "case does not involve the government as a party in a contractual relationship with an independent contractor" misunderstands this Court's broad holding in *Umbehr*. This particular contractual relationship may raise different issues than more typical government contracts cases, but—just as in *Umbehr*—there is no reason that the *Pickering* balancing test cannot accommodate such differences. *Id.* at 678. Brentwood is a party to a voluntary contract with the government, and is contending that it was punished within the confines of that contract for protected speech. It is *at most* entitled to the protection of the *Pickering* test.

To prevail under that test, a plaintiff must first prove that it spoke "as a citizen on a matter of public concern." If those threshold requirements are met, the court must balance the employee or contractor's interests, as a citizen, in speaking on matters of public concern against the government's interests in the programs it administers through its employees or contracts. *Pickering*, 391 U.S. at

568. Brentwood cannot possibly satisfy those standards. Brentwood was not speaking "as a citizen" in the relevant sense. This Court recently clarified that employees or contractors have *no* right to speak freely *while performing their job or contract functions*, and can be disciplined for such speech without First Amendment scrutiny. *Garcetti*, 126 S. Ct. at 1960. (That is, of course, a manifestation of the same principle animating *Rust* and its progeny: the government is entitled to define the purposes and limits of its own programs, and insist that participants abide by those limits within the confines of their participation). Recruiting eighth graders to play high school football also is not speech on any "matter of public concern." *See City of San Diego v. Roe*, 543 U.S. 77 (2004). The Sixth Circuit's holding that Brentwood's speech is automatically about a matter of public concern if the recruiting rule is supported by any substantial state interest confuses apples and oranges, and would write the "public concern" test out of the law entirely. Brentwood therefore fails the threshold conditions for protection under the *Pickering/Umbehr* test. Even if a balancing of interests were appropriate, TSSAA's substantial interests in this rule certainly outweigh Brentwood's interests in violating it.

Third, even if the Sixth Circuit's "time, place, and manner" lens were appropriate, its application of intermediate scrutiny was seriously flawed. The Sixth Circuit conceded that TSSAA's recruiting rule is generally justified by its substantial interests in protecting students and ensuring that athletics remain subordinate to academics. It held, however, that "there was no evidence to show that the punishment of Brentwood was justified due to the effect of Brentwood's actions on the children or the relative standing of academics and athletics at the school." Pet. App. 106. But TSSAA is entitled to enforce a constitutionally justified rule without regard to whether that particular violation actually threatened the reasons for the rule. This Court has always asked whether the rule itself is justified by substantial state interests—not whether

this particular plaintiff's violation was somehow harmless. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), this Court squarely rejected the argument that Ohio must prove that enforcement furthered the purposes behind the rule, holding that the state is not required to prove actual injury and that "the absence of explicit proof or findings of harm or injury [is] immaterial." *Id.* at 468; *see also Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 296-97 (1984) (validity of time, place, and manner regulation "need not be judged solely by reference to the demonstration at hand," and the government's interests in generally applying the regulation cannot be challenged by advocating for an exception); *Heffron v. Int'l Socy for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53 (1981) (same); *cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). "Similarly, TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rules it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics for the anti-recruiting rules to be valid." Pet. App. 144 (Rogers, J., dissenting). No athletic association (or government agency) could function if every time it attempted to enforce its rules it bore the burden of proving why the purposes of the rule supported that enforcement.

Put another way, the Sixth Circuit essentially held that TSSAA's recruiting rule is overbroad, and that a somewhat narrower prohibition (one that would not reach Brentwood's conduct in this case) would be more appropriate. That misconceives the inquiry. A "time, place, and manner" regulation is valid "so long as [it] promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). As this Court recently clarified in *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.*, it does not matter if the regulation is overbroad in some respects relative to the interests it is designed to serve. "The issue is not whether other means ... might be adequate. That is a judgment for Congress, not the courts. It suffices that the

means chosen by Congress add to the effectiveness of military recruitment." 126 S. Ct. 1297, 1311 (2006) (citations omitted). And this Court's holding that TSSAA is a state actor because of its "entwinement" with the public schools also necessarily implies that TSSAA is entitled to the deference that this Court gives to educational judgments.[5]

This Court should grant review to untangle the serious misconceptions embedded in the Sixth Circuit's analysis. If this Court declines to grant review on the merits, however, petitioners respectfully suggest that this decision should be vacated and remanded in light of *Garcetti* and *FAIR*.

B. The Sixth Circuit's Holding Conflicts with Decisions of Other Circuits

The Sixth Circuit's decision is inconsistent with several lines of authority in the other courts of appeals.

First, consistent with this Court's decision in *Snepp* the Third, Fourth, Eighth, and Ninth Circuits have held that an explicit contractual commitment to limit one's own speech will be enforced. *See Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *Erie Telecomms. Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *Lake James Cmty. Volunteer Fire Dep't. v. Burke County*, 149 F.3d 277, 280-82 (4th Cir. 1998); *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993); *cf. Metro E. Ctr. for Conditioning & Health v. Qwest Communs. Int'l*, 294 F.3d 924, 928 (7th Cir. 2002). Brentwood voluntarily agrees each

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[5] *See Hazlewood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (deferring to government regulation of speech in the educational context); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 275 n.6 (Stevens, J., dissenting) ("A school's extracurricular activities constitute a part of the school's teaching mission, and the school accordingly must make decisions concerning the content of those activities.") (quotation omitted); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board" not the federal courts.); *Bd. of Educ. v. Pico*, 457 U.S. 853, 909-10 (1982) (Rehnquist, J., dissenting) ("[A]ctions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign").

year to abide by TSSAA's recruiting rule, and these circuits would hold Brentwood to its bargain. The Sixth Circuit held that any valid waiver of First Amendment rights must include a specific promise not to sue to challenge the speech restriction. Pet. App. 7-8. That requirement is not consistent with the cited cases (or with this Court's decision in *Snepp*). Brentwood may retain the right to file this lawsuit, but that does not mean its contract does not limit the substantive scope of its First Amendment claim.

Second, several circuits have recognized that the *Pickering/Umbehr* test applies to a broad spectrum of voluntary relationships with the government, in conflict with the Sixth Circuit's holding that it is limited to employees and contractors, narrowly conceived. Pet. App. 91. Those circuits would have rejected Brentwood's claim.

In the Second Circuit, *Pickering* was held to govern the expulsion of members from a voluntary 4-H club that was a "subordinate government agency" under state law. *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 548 (2d Cir. 2001). If *Gorman* is distinguishable from this case, it is only because the plaintiffs there had a much stronger claim than Brentwood has here. They were expelled for speech that undermined the operations and objectives of the voluntary association, but unlike Brentwood they had not specifically promised in advance to refrain from that speech. *See also Rottmann v. Pa. Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922 (W.D. Pa. 2004) (applying *Pickering* in nearly identical circumstances to this case).

Other circuits have likewise applied *Pickering* beyond the employee or independent contractor context when the plaintiff was in a voluntary relationship with the government. The Seventh Circuit applied *Pickering* to expulsion of students from voluntary state-run ROTC programs. *Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980). Courts have also applied *Pickering* to the termination of volunteers from state-run voluntary

associations such as fire departments,[6] to the termination of licensees who were granted a contractual privilege,[7] and to cases in which a state actor refused to employ a person or do business with a prospective contractor on speech-related grounds.[8] *See also Blackburn v. City of Marshall*, 42 F.3d 925, 932 (5th Cir. 1995) ("[a]lthough the *Pickering/Connick* test arose in the context of public employment, courts have not strictly cabined its application"). Judge Rogers correctly noted in dissent in this case that "[t]here is no reason to limit the *Connick* no-public-concern analysis strictly to government employee cases," Pet. App. 138 and at least eight circuits agree.

II. COMPETITIVE EQUITY IS A SUBSTANTIAL STATE INTEREST

The Sixth Circuit held that TSSAA failed to prove that it has any substantial interest in fostering a level playing field among its member schools because TSSAA supposedly "cite[d] to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest...." Pet App. 100. That ruling was essential to the outcome because the recruiting rule is obviously narrowly tailored to serve this interest. The panel did not suggest otherwise.

The panel's ruling is unprecedented and has far reaching implications. "[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." Paul C. Weiler, LEVELING

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[6] *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979); *Versarge v. Twp. of Clinton*, 984 F.2d 1359 (3d Cir. 1993); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000).

[7] *See Copsey v. Swearingen*, 36 F.3d 1336 (5th Cir. 1994); *Havekost v. United States Dep't of Navy*, 925 F.2d 316, 318 (9th Cir. 1991); *Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir. 1989); *Caine v. Hardy*, 943 F.2d 1406, 1415-16 (5th Cir. 1991) (*en banc*).

[8] *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997); *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000); *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) (*en banc*).

THE PLAYING FIELD 2 (2000). Whenever people play competitive sports, they invariably devise eligibility or talent-spreading rules to ensure that competition is fair and no one team has an overwhelming advantage. Children on a playground alternate picking players for teams. All major professional sports leagues have a draft and restrictions on free agency, and many have salary caps or revenue sharing. All of these rules have as their primary purpose a desire to create and maintain competitive balance. *See, e.g., Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987) (purpose of NBA salary cap and draft restrictions is "spreading talent among the various teams"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978) ("The NFL draft, like similar procedures in other professional sports, is designed to promote 'competitive balance.'").

Competitive equity and balance is similarly essential to the goals of high school athletics. TSSAA's constitution recognizes that "the primary objective of all secondary schools is to educate youth," and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." CAJA 132. All those goals are undermined if student athletes perceive that the deck is unfairly stacked against them or that competition is futile, and become dispirited or cease participation. *See* CAJA 1571-72.

Perhaps the Sixth Circuit was confused by the "state action" posture of this case, because competitive equity in high school sports is not usually a significant preoccupation of state governments. But competitive equity surely and self-evidently *is* one of the central and important goals of any athletic league—and if high school athletic associations are to be treated as state actors then competitive equity must be recognized as an important *governmental* interest as well. The Sixth Circuit's allusion to a perceived lack of "evidence" is a red herring. As the dissent properly recognized, "the City of Renton need not provide evidence for the obvious proposition that crime increases are against the public interest, and New York in the *Ward* case need

not provide evidence that appropriate modulation of band concerts is in the public interest. Similarly, it can hardly be argued that TSSAA needed more evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." Pet. App. 144-45 n.2.

The Sixth Circuit's decision conflicts with several other circuits and the highest courts of several states, which have all recognized (without requiring any special evidence) that competitive equity is vital to interscholastic sports. The Eighth Circuit in *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994), held that a rule enforcing an age limit "helps reduce competitive advantage flowing to teams using older athletes," which was "of immense importance in any interscholastic sports program." The Third Circuit in *Smith v. NCAA*, 139 F.3d 180, 185, 187 (3d Cir. 1998), recognized that the NCAA's eligibility rules "primarily seek to ensure fair competition ... and allow for an even playing field." The Seventh Circuit upheld the NCAA's no-agent rules because they "preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992). None of these courts scoured the record for evidence that competitive equity is important. They accepted it as self-evidently important. *See also Chabert v. Louisiana High Sch. Athletic Ass'n*, 312 So. 2d 343, 346 (La. Ct. App. 1975) (finding that "illegal recruiting of promising young athletes is the gravamen of this recurring problem," and that "it is unarguable that any state has an interest in prohibiting such occurrences in its high schools"); *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 467 N.W.2d 21, 25 (Mich. 1991) (upholding eligibility rule because it was "designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes"); *Law v. NCAA*, 134 F.3d 1010, 1023-24 (10th Cir. 1998) ("We note that the NCAA must be able to ensure some competitive equity between member institutions in order to produce a

marketable product: a 'team must try to establish itself as a winner, but it must not win so often and so convincingly that the outcome will never be in doubt, or else there will be no marketable 'competition.'") (citation omitted); *NCAA v. Lasege*, 53 S.W.3d 77, 86 (Ky. 2001) (the NCAA "certainly has an interest in the proper application of [its] regulations to ensure competitive equity"); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 842, 844 (7th Cir. 1999) (recognizing "the public's interest in maintaining a level field of competition" and "competitive equality").

III. THE SIXTH CIRCUIT'S DUE PROCESS ANALYSIS IS FLAWED AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

TSSAA's constitution and bylaws contain not only a set of rules but also a process for enforcing them and for resolving appeals or disputes. Brentwood voluntarily agrees each year to abide by TSSAA's rules, including its grievance procedures. In this context, Brentwood is not entitled to any more "process" than it voluntarily contracted to receive. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (due process is satisfied by arbitration if the employee agreed to arbitrate); *First State Ins. Co. v. Banco de Seguros Del Estado*, 254 F.3d 354, 357 (1st Cir. 2001) ("It was the method chosen by the parties to receive notice and therefore cannot be deemed to offend due process."); *Dominium Austin Partners, L.L.C., v. Emerson*, 248 F.3d 720, 726 (8th Cir. 2001) ("Due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause.").

The Sixth Circuit did not even mention the contractual procedures to which the parties agreed, and its ruling that TSSAA somehow violated Brentwood's due process rights in the abstract conflicts squarely with the Seventh Circuit's decision in *Batagiannis v. W. Lafayette Sch. Corp.*, 454 F.3d 738 (7th Cir. 2006). In that case, a school superintendent argued that her due process rights were violated because the school board conducting her termination hearing had already pre-judged her, and the hearing was a sham. The

Seventh Circuit held that Batagiannis had no viable due process claim because she "received exactly what she had agreed to accept: a hearing by the school board. That's what ¶5.b of her contract specified; by signing, she waived any entitlement to a wholly neutral decision-maker." *Id.* at 741. Unquestionably, Brentwood's due process claim would be rejected under *Batagiannis* in the Seventh Circuit.

Of course in some contexts, such as the firing of a tenured public employee, there is a constitutional minimum floor of due process that parties cannot be required to waive. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). But even if the same is true for high school athletics, the Sixth Circuit failed to recognize that the constitutional floor is not the same in all contexts. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). There is no reason for the federal courts to become deeply enmeshed in second-guessing the contractually agreed procedures for resolving athletic disputes. Certainly a player being ejected from a game for unsportsmanlike conduct is entitled to no process at all. The Sixth Circuit imported a standard from the tenured public employee cases requiring an "explanation of the employer's evidence," *Loudermill*, 470 U.S. at 546, but there is no reason that anything more than the "essential requirements" of "notice and an opportunity to respond" should apply to an athletic association enforcing its internal operating rules. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (due to "institutional needs and objectives," prisoners need not be informed in advance of evidence).

Finally, the Sixth Circuit was simply wrong as a matter of fact and law in holding that TSSAA's procedures were constitutionally deficient. Under *any* standard, TSSAA's procedures far exceed what is constitutionally required. The district court wrongly credited a statement that TSSAA considered *ex parte* evidence of recruiting violations by Brentwood booster Bart King, which as the dissent explains is clear factual error. Pet App. 147-48. Regardless it is undisputed that Brentwood's notice of the alleged violations included notice that King's activities were at

issue. CAJA 1844-47, 1839-43, 1851-54, 1861-65. It is also undisputed that Brentwood received a full formal evidentiary hearing, where it was represented by counsel and to which it even brought Mr. King. Pet. App. 68. The Sixth Circuit's real holding is that Brentwood was somehow entitled to advance notice of which of the fully disclosed concerns might be regarded as important by the decisionmaker in deliberations. No court has ever endorsed a standard like that, and it is completely unworkable.[9]

IV. THIS COURT SHOULD RECONSIDER ITS STATE ACTION HOLDING

The Sixth Circuit's confusion demonstrates why this Court should reconsider its state action analysis in *Brentwood I*. In that opinion, this Court discarded the traditional inquiry into the particular state *action* in addition to the status of the *actor*. The Sixth Circuit therefore looked purely at TSSAA's overall "entwinement" with the state, and was unable to recognize, for example, that the specific conduct complained of here was not an exercise of sovereign power but simply implementation of a voluntary contract. Put another way, enforcement of the recruiting rule "entailed functions and obligations in no way dependent on state authority." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). *Brentwood I's* exclusive focus on the status of the actor has now produced the incongruous result that a voluntary association of public and private actors "entwined" with the state has even less ability to enforce rules that its own members have voluntarily adopted than the state itself would have to enforce speech restrictions against its employees or contractors under *Snepp*, *Rust*, and *Umbehr*. The Sixth Circuit also was unable to understand how competitive equity could be a substantial *governmental*

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[9] For the reasons set forth, both the First Amendment and Due Process issues warrant review. In addition, Brentwood would remain a "prevailing party" eligible for a large and entirely unjustifiable attorneys' fee award at TSSAA's expense unless both rulings are reversed.

interest, even though it is a central purpose of the athletic associations that this Court has now deemed state actors.

Brentwood I was a break from this Court's precedents. *See Brentwood I*, 531 U.S. at 306 (Thomas, J., dissenting); *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (looking to "the specific conduct of which the plaintiff complains"). Lower courts have been confused by *Brentwood I*'s new "entwinement" doctrine, describing it as "labyrinthine," "nebulous," "vague," and a "freewheeling *gestalt* analysis."[10] The Second Circuit has held, in effect, that a state action claim can never be frivolous after *Brentwood I*. *Tancredi*, 378 F.3d at 230. Lower courts are even confused about how many different state action tests there are. *See Wang v. Blue Cross Blue Shield Ass'n*, 55 F. App'x 802, 803 (9th Cir. 2003) ("seven approaches to the issue"); *Keeling v. Schaefer*, 181 F. Supp. 2d 1206 (D. Kan. 2001) (four tests); *Sabeta v. Baptist Hosp. of Miami, Inc.*, 410 F. Supp. 2d 1224 (S.D. Fla. 2005) (three tests). Commentators have also been deeply critical of the decision. *See, e.g.*, John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 587 (2005) (characterizing "entwinement" as "so malleable that no outcome is excluded ... artificial and incapable of principled application"); Alan R. Madry, Statewide School Athletic Associations and Constitutional Liability; Brentwood Academy v. Tennessee Secondary School Athletic Association, 12 MARQ. SPORTS L. REV. 365 (2001) ("incoherent," "ad hoc," and "rides against a strong contrary tide"); Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of*

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[10] *See, e.g., Leshko v. Servis*, 423 F.3d 337, 338 (3d Cir. 2005) ("labyrinthine"); *Kirtley v. Rainey*, 326 F.3d 1088, 1094-95 (9th Cir. 2003) ("vague"); *Tancredi v. Metro. Life Ins.*, 378 F.3d 220, 230 (2d Cir. 2004) ("nebulous"); *Crissman v. Dover Downs Entmt.*, 289 F.3d 231, 233 (3d Cir. 2002) ("little is straightforward"); *Willis v. Town of Marshall*, 293 F. Supp. 2d 608, 615 (W.D.N.C. 2003) ("anything but clear and consistent"), *rev'd in part on other grounds*, 426 F.3d 251 (4th Cir. 2005); *Gross v. Fond Du Lac Cty. Agric. Soc'y, Inc.*, 2005 U.S. Dist. LEXIS 19537, at *23 (E.D. Wis. Sept. 6, 2005) ("freewheeling *gestalt* analysis").

Substantive Context, 26 CARDOZO L. REV. 99, 125 (2004) ("the Court appears to have gone astray").

When this Court reconsiders a recent decision that "itself *departed* from ... prior cases – and did so quite recently," this Court does "not depart from the fabric of the law; [it] restore[s] it." *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 233-34 (1995) (op. of O'Connor, J.) (emphasis in original); *accord Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (Frankfurter, J.) ("[*S*]*tare decisis* is ... not a mechanical formula of adherence to the latest decision"); *Payne v. Tennessee*, 501 U.S. 808, 835 (1991) (Scalia, J., concurring). *Brentwood I* was "decided by the narrowest of margins, over [a] spirited dissent[] challenging the basic underpinnings of th[e] decision[]." *Id.* at 829. And it is a very new decision that has not engendered any meaningful reliance. In such circumstances neither *stare decisis* nor the law of the case doctrine precludes reconsideration. *See Agostini v. Felton*, 521 U.S. 203 (1997) (overruling earlier decision at later stage of the same litigation).

V. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

This case has broad significance to the interscholastic sports and educational community, including the fifty-one high school athletic associations composed primarily of public schools, 17,346 member schools, and over 10 million participating students across the country. The entire enterprise of interscholastic athletic competition depends on clear and enforceable rules, and sometimes those rules must restrict speech or expressive conduct, ranging from recruiting limitations to ejecting a coach or player for unsportsmanlike conduct. As shown by the legions of athletic association cases on the books, high school sports can arouse tremendous passions and frequent litigation. This case alone has stretched for nearly ten years, with three trips to this Court, and three published decisions of the Sixth Circuit. High school athletic associations like TSSAA typically receive no state funding, and finance their operations through modest membership dues and gate

receipts at tournament games. They do not have the means to engage in continuous constitutional litigation,[11] and their (often volunteer) leaders do not have the incentive to accept serious risks of personal liability for constitutional violations lurking behind every effort to enforce compliance with agreed upon rules. Indeed, in this very case, Brentwood sued TSSAA's executive director Ronnie Carter in his individual capacity, and Mr. Carter escaped crushing personal liability only because of the Sixth Circuit's qualified immunity ruling—which may not be available to the next defendant in his position because of this case.

The Sixth Circuit's decision in this case threatens to unleash a wide array of litigation over rules that limit speech in the context of athletic or other competition. If the lower courts manage to navigate this Court's precedents correctly, cases brought by disappointed *public* schools will eventually be dismissed on the ground that state entities have no constitutional rights, and cases brought by public school coaches or teachers will eventually be dismissed under *Garcetti*. But the Sixth Circuit's ruling in this case creates an entirely different set of rules for private schools. Voluntary athletic associations composed primarily of public schools frankly do not need private school participation to flourish, and have no reason to allow it if their presence simply invites enterprise-threatening constitutional lawsuits and if the rules of fair play cannot be enforced equally. The best that can be hoped for from the Sixth Circuit's decision is, therefore, an end to private school participation in organizations like TSSAA.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

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[11] Kevin P. Braig, *A Game Plan to Conserve the Interscholastic Athletic Environment After LeBron James*, 14 MARQ. SPORTS L. REV. 343, 364-65 (2004) (noting that "[p]rior to the Supreme Court's decision in *Brentwood Academy*, the members of the high school athletic associations ... did not bear the economic cost of recruiting allegations").

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY, PLAINTIFF-APPELLEE

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, EXECUTIVE DIRECTOR AND INDIVIDUALLY, DEFENDANTS-APPELLANTS.

No. 98-6113.

Argued: July 19, 2001.
Decided: August 23, 2001.
Filed: August 23, 2001.

Before GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge:

This case is before us on remand from the Supreme Court. Brentwood Academy, a private school and member of the Tennessee Secondary School Athletic Association (TSSAA), sued TSSAA pursuant to 42 U.S.C. § 1983 for the alleged violation of its First Amendment rights. Specifically, Brentwood challenges the constitutionality of TSSAA's "recruiting rule," which prohibits member schools from exerting "undue influence . . . to secure or retain a

student for athletic purposes." The district court granted summary judgment in favor of Brentwood, holding that the recruiting rule violates the school's First Amendment rights.

TSSAA appealed, arguing that it is not a state actor for the purposes of § 1983 and, in any event, that the recruiting rule does not run afoul of the First Amendment. We reversed the decision of the district court on the basis that TSSAA is not a state actor, and therefore not subject to suit under § 1983. The Supreme Court granted certiorari and disagreed with our opinion, holding that TSSAA is in fact a state actor. It then remanded the case back to us for further proceedings consistent with the Court's opinion.

We now turn to the merits of TSSAA's appeal. After considering the parties' supplemental briefs and hearing oral arguments regarding the recruiting rule, we conclude that the district court erred in granting summary judgment in favor of Brentwood. For the reasons set forth below, we therefore REVERSE the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

Brentwood is a private school located in Brentwood, Tennessee that has historically placed a strong emphasis on athletics. In particular, the football team has been nationally ranked by *USA Today* and has won at least seven TSSAA state championships. Brentwood's basketball team is also well known in athletic circles.

TSSAA is an association comprised of public, independent, and parochial secondary schools from across the state of Tennessee, whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." To that end, TSSAA has enacted a "recruiting rule" designed to place limits on the recruiting practices of

secondary schools in soliciting middle school student athletes to participate in secondary school athletics. The recruiting rule is found in Article II, Section 21 of the TSSAA Bylaws, and reads as follows:

> Section 21. The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

Section 21 is comprised of not only the recruiting rule itself, but also the equivalent of two full pages of questions, answers, and guidelines that provide explanations, details, and examples of the types of conduct the recruiting rule prohibits. This commentary sets forth principles that aid the member schools in complying with the recruiting rule. For example, the first question provides the following information on what the term "undue influence" means:

> Q. How is undue influence interpreted in the recruiting rule?
>
> A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

The third question explicitly prohibits coaches from initiating contact with students prior to their enrollment in a secondary school:

> Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?
>
> A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

The fourth question asks: "What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?" It then provides seven examples. The third example reiterates that the recruiting rule prohibits "any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern." The seventh example specifically prohibits "admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school." The feederschool exemption is not applicable to Brentwood, because it has no feeder pattern with any school.

Several representatives of Brentwood met with Ronnie Carter, the Executive Director of TSSAA, on February 10, 1993. This meeting was held at the request of Brentwood for the purpose of clarifying what types of recruiting practices would be acceptable under the recruiting rule. Michael S. Peek, a lawyer for Brentwood, followed up with a letter on February 24, 1993 that was intended to confirm Brentwood's understanding of the numerous ways in which Brentwood could communicate with prospective students about its athletic programs without violating the recruiting rule.

In 1997, several coaches at other member schools complained to TSSAA that Brentwood had violated various TSSAA rules. Carter conducted an investigation of the complaints. On July 27, 1997, Carter wrote a letter to Brentwood outlining six alleged violations of TSSAA rules. Five violations related to the recruiting rule and one to the sports-calendar rule. Only the recruiting rule violations are at issue in this appeal.

The alleged recruiting rule violations arose from two incidents. The first incident occurred when Brentwood's

then Athletic Director and Head Football Coach, Carlton Flatt, provided free tickets to a middle school coach for a Brentwood football game. These tickets were then used by the middle school coach to take several of his students to attend the game. The second incident arose when Coach Flatt sent letters and made followup telephone calls in the spring of 1997 to students from other schools who had contractually agreed to attend Brentwood in the fall of 1998, but who had not themselves solicited any information regarding Brentwood's athletic program. Carter, on behalf of TSSAA, imposed a number of penalties on Brentwood for these violations.

Brentwood appealed the sanctions according to the two-step process set forth in the TSSAA Bylaws. Carter presided at the first step and reduced the sanctions as a consequence of the appeal. Brentwood next appealed to the full Board of Control of TSSAA, which at the time consisted only of public high school principals. A hearing was held on August 23, 1997. The Board of Control found that Brentwood had violated the recruiting rule by admitting student athletes free of charge to an athletic contest and by contacting middle school students while they were enrolled in other schools. As punishment, the Board fined Brentwood $ 3,000, placed its athletic program on probation for four years, and suspended Brentwood from participating in tournaments and conducting certain types of off-season practice for two years.

B. Procedural history

Brentwood filed suit against TSSAA in the United States District Court for the Middle District of Tennessee on December 12, 1997. It alleged that TSSAA was a state actor and that TSSAA's enforcement of the recruiting rule violated its First and Fourteenth Amendment rights. Brentwood also sought an injunction against TSSAA's enforcement of the recruiting rule. Faced with cross-motions for summary judgment, the district court

granted Brentwood's motion for summary judgment on its First Amendment claim and enjoined TSSAA from enforcing the recruiting rule.

TSSAA appealed the district court's grant of summary judgment in favor of Brentwood, arguing that (1) TSSAA is not a state actor, thereby rendering it immune from constitutional scrutiny, and (2) the recruiting rule in any case does not violate Brentwood's First Amendment rights. Our prior opinion did not reach the merits of TSSAA's challenge to the district court's First Amendment ruling because we concluded that TSSAA was not a state actor. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999). Brentwood sought review of our decision by the Supreme Court, which granted certiorari. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 528 U.S. 1153, 145 L. Ed. 2d 1069, 120 S. Ct. 1156 (2000). The Supreme Court reversed our decision, holding that TSSAA is a state actor, and remanded the case to us for further proceedings consistent with its opinion. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001). Before us now are the merits of TSSAA's appeal regarding the constitutionality of the recruiting rule.

II. ANALYSIS

A. Standard of review

We review de novo the district court's grant of summary judgment. *See, e.g., Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The judge is not to "weigh the evidence and determine the truth of the

matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A genuine issue for trial exists only when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

B. Brentwood has not waived its right to challenge the constitutionality of the recruiting rule

TSSAA now recognizes, as it must under the Supreme Court's ruling, that it is a state actor subject to constitutional challenges. It nevertheless argues that Brentwood has waived its right to question the constitutionality of the recruiting rule because, by voluntarily choosing to be a member of TSSAA, it has agreed to abide by the rules of the organization. TSSAA thus contends that Brentwood is faced with "the choice between joining TSSAA and complying with the rules or competing in interscholastic athletics as a nonmember of TSSAA."

The five cases that TSSAA cites to support its argument, however, are distinguishable from the case at hand. *See Town of Newton v. Rumery*, 480 U.S. 386, 94 L. Ed. 2d 405, 107 S. Ct. 1187 (1987) (holding that a criminal defendant can waive important constitutional rights by entering into a plea bargain); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 31 L. Ed. 2d 124, 92 S. Ct. 775 (1972) (holding that where there is no unequal bargaining power or overreaching, debtors can voluntarily, intelligently, and knowingly waive due process rights by signing a cognovit note, which is an agreement by which a debtor consents in advance to a holder's obtaining a judgment without notice or hearing); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985) (concluding that when a party knowingly, voluntarily, and intentionally signs a jury waiver provision in a civil case, that party has waived its right to a jury trial); *International Union v. Dana Corp.*, 697 F.2d 718, 719 (6th Cir. 1983) (holding that a settlement agreement between

Dana and the union rendered an appeal moot, even though the agreement "effectively prevented Dana from communicating with its employees regarding [a union campaign] at one of Dana's subsidiaries"); *Lake James Cmty. Volunteer Fire Dep't v. Burke County*, 149 F.3d 277 (4th Cir. 1998) (concluding that an agreement between a volunteer fire department and the county that prohibited the fire department from suing the county was enforceable, even though it waived the fire department's constitutional right to petition the government).

The common legal thread among the above five cases is that they all involve parties that actually waived their right to sue. There is no comparable TSSAA provision prohibiting members from challenging the constitutionality of the recruiting rule. Moreover, Brentwood points out that what was once called the "bitter-with-the-sweet" doctrine has been replaced with the "unconstitutional conditions" doctrine. In the words of the Supreme Court:

> Recognizing that constitutional violations may arise from the deterrent, or chilling, effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights . . . our modern unconstitutional conditions doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996) (internal quotation marks and citation omitted) (alterations in original).

Umbehr involved a § 1983 claim for unlawful retaliation brought against the county's governing body by an independent contractor who provided trash collection services to the county. The Court held that the contractor

had stated a cause of action based on the allegation that his contract was terminated in retaliation for his criticism of the county commission. *Umbehr* is an extension of the protections provided to public employees under the First Amendment. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968) (holding that the board of education violated a school teacher's First Amendment rights by dismissing him because he had criticized the board in a letter to the local newspaper). We believe that the Supreme Court's rulings that parties do not give up First Amendment rights by contracting with, or being employed by, a public agency forecloses TSSAA's argument that Brentwood gave up its right to challenge the constitutionality of the recruiting rule because it voluntarily joined TSSAA.

TSSAA argues, however, that the First Amendment protection afforded by *Umbehr* and *Pickering* applies only when the content of a contractor's or employee's speech involves a "matter of public concern." *Umbehr*, 518 U.S. at 685; *see also Pickering*, 391 U.S. at 574. It claims that the recruiting rule does not implicate a matter of public concern, and is therefore unworthy of First Amendment scrutiny. But TSSAA cannot have it both ways. As set forth in Part II.F. below, TSSAA will have to establish that the recruiting rule embodies substantial governmental interests as a necessary element of the rule's enforceability. These substantial interests will by definition implicate a "matter of public concern." *See Pickering*, 391 U.S. at 573 (holding that issues involving the local board of education were "matters of public importance").

We therefore conclude that Brentwood has not waived its right to challenge the constitutionality of the recruiting rule by voluntarily joining TSSAA. This means that we must now reach the merits of the district court's First Amendment analysis of the recruiting rule.

C. The district court erred in holding that the recruiting rule is a content-based regulation for the purposes of First Amendment analysis

TSSAA's appeal broadly challenges the analytical framework that the district court used to determine the constitutionality of the recruiting rule. The primary contention of TSSAA is that the district court erred in concluding that the recruiting rule is a content-based regulation that fails strict scrutiny review. We agree.

A fundamental premise of First Amendment jurisprudence is that the "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995). Such regulations are subject to "the most exacting scrutiny," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994), which means that the state actor must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987). On the other hand, content-neutral regulations that simply restrict the time, place, and manner of speech are subject to intermediate scrutiny. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 560 (6th Cir. 2001) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)). Under that analysis, content-neutral regulations must be "narrowly tailored to serve a significant governmental interest . . . that . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).

The Supreme Court has recognized that "deciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broad.*, 512

U.S. at 642. In this instance, the district court concluded that the recruiting rule "is content-based because the interests asserted by [TSSAA] to support the ban focus on the content of the message and the effect of the message on the listener." We respectfully disagree.

In our opinion, the recruiting rule does not impose a total ban, or a "Berlin Wall" as Brentwood calls it, on communications between secondary schools and middle school athletes regarding high school athletics. Rather, the recruiting rule prohibits secondary schools from exerting an "undue influence" on students with the goal of "securing or retaining a student for athletic purposes." We do not see how the recruiting rule, as defined by the questions, answers, and guidelines contained within the TSSAA Bylaws, bans the substantive content of any particular message. It is clear to us that the greatest restriction imposed by the recruiting rule is the prohibition on coaches, coaching staff, and school representatives from initiating contact with middle school students for the purpose of recruiting student athletes.

In our view, prohibiting coaches from initiating contact with students or their parents prior to enrollment in the school is a limitation on the manner in which secondary schools can communicate with students about their athletic programs. It does not mean, however, that Brentwood has no other outlet for providing such information to prospective students, or that middle school students have no way of finding out this information or learning about their educational options.

Perhaps the strongest evidence in the record that supports our view that the recruiting rule does not constitute a total ban on communications between secondary schools and prospective students regarding athletic programs is the letter that Brentwood attorney Michael Peek wrote to Ronnie Carter following their meeting in February of 1993. The letter details numerous ways in

which Brentwood can get its message about athletics out to prospective students. Examples of conduct that Peek claims were explicitly approved by Carter on behalf of TSSAA include the following: admissions officers and representatives of Brentwood can supply information that real estate agents may give to new families moving to the community; Brentwood can respond to direct inquiries from students or their families that have contacted it for information; Brentwood can advertise in any publication it chooses; and Brentwood can contact 7th and 8th graders in any school regardless of their extracurricular activities and interests if such contact is made in the context of a letter or other communication directed to members of the class as a whole. We believe that this range of options, which is not exclusive, acknowledges that Brentwood has multiple ways of communicating with middle school students to provide them with information about the academic, athletic, and spiritual aspects of the educational experience at Brentwood.

We fail to see how the recruiting rule "effectively drives certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991). But Brentwood maintains that the recruiting rule constitutes a content-based regulation of speech in at least three ways. First, it argues that the recruiting rule prohibits independent schools and their representatives from "discussing an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980). Second, Brentwood claims that the rule prevents prospective students and their parents from learning about independent educational options. Finally, it maintains that TSSAA enacted the recruiting rule to prevent prospective students from learning about athletic programs at independent secondary schools.

Brentwood's three contentions, however, are not persuasive. As described above, the prohibitions of the recruiting rule do not prevent representatives of Brentwood from discussing the entire topic of its athletic programs. Prospective students and their parents also have a wide range of available means to receive information about the athletic and educational opportunities that Brentwood provides. Nor is there evidentiary support for Brentwood's position that the recruiting rule is a content-based regulation designed by TSSAA out of fear of what prospective students would learn about the athletic programs at independent secondary schools. If TSSAA had been motivated by a fear of the impact that information regarding athletic programs would have on students, it would presumably have banned recruiting and communications altogether. This it did not do.

Finally, we reject Brentwood's contention that the recruiting rule is unconstitutional because it controls who can speak for Brentwood. The recruiting rule is not an unconstitutional regulation that "dictates . . . the speakers who may address a public issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978) (holding that a state statute prohibiting expenditures by banks and business corporations for the purpose of influencing the vote on any question other than one materially affecting the business interests of the corporation unconstitutionally infringed on their First Amendment rights). Although the rule emphasizes that coaches and members of the coach's staff must refrain from exerting "undue influence" by initiating contact with prospective students, the rule does not ban these persons from communicating with students who themselves initiate contact.

In sum, we conclude that the district court erred in holding that the recruiting rule is a content-based regulation subject to analysis under "the most exacting scrutiny."

Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 642, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994). We therefore turn to an analysis of the rule as a content-neutral regulation.

D. The recruiting rule is a content-neutral regulation subject to intermediate scrutiny

We are of the opinion that the recruiting rule is a content-neutral regulation analogous to certain zoning ordinances that have been deemed to contain reasonable time, place, and manner restrictions. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), for example, an ordinance provided specific zoning requirements for adult theaters. The Supreme Court found that "the Renton ordinance [was] aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47 (emphasis in original). As long as the zoning ordinance did not ban the existence of these theaters outright, the Supreme Court found it to be content neutral. *See id.* at 46 ("The Renton ordinance . . . does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."). Similarly, the recruiting rule does not completely ban all communications between coaches and prospective students, but does keep them "at a distance" by prohibiting the coaches and those acting on their behalf from initiating the contact.

Other examples of regulations that have been upheld against First Amendment challenges despite limiting the time, place, and manner of the targeted activities include *Madsen v. Women's Health Ctr, Inc.*, 512 U.S. 753, 772, 129 L. Ed. 2d 593, 114 S. Ct. 2516 (1994) (upholding a state court injunction that restricted the use of sound amplification equipment and other noise created by antiabortion protesters to certain hours and days); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814-15, 80

L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (upholding an ordinance that prohibited the posting of signs on public property based on the government's interest in promoting aesthetics); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981) (upholding a state regulation requiring a religious organization that desired to distribute religious materials and solicit donations at a state fair to do so only at a rental booth in the designated area).

The Supreme Court has recognized that content-neutral regulations can have a dampening effect on the substance of the protected speech, but that such limitations are constitutionally permissible. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) (upholding the regulation of noise levels at musical performances in a public park to avoid undue intrusion on the tranquility of the surrounding public and residential areas). Assuming that TSSAA is able to successfully establish that it has substantial governmental interests in support of the recruiting rule (see Part II.F. below), we cannot say that the rule's incidental effect of preventing members of high school coaching staffs from initiating contact with middle school students is fatal to content neutrality. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

Based on our conclusion that the recruiting rule is content neutral, it is subject to an intermediate scrutiny standard of review. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 560 (6th Cir. 2001). "'Content-neutral' time, place, and manner

regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton*, 475 U.S. at 47; *see also Ward*, 491 U.S. at 798 ("the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so").

E. The recruiting rule is not facially overbroad in violation of the First Amendment

The district court also held that even if the recruiting rule is not an unconstitutional content-based regulation, it runs afoul of the First Amendment because the language of the rule provides TSSAA with the "unbridled discretion to penalize those expressing points of view with which it disagrees." In so ruling, the district court relied on *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-33, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992). *Forsyth County* involved a facial challenge under the "overbreadth doctrine" to a county ordinance that required parties to obtain a permit and pay a fee in order to gain authorization to speak publicly, hold a public parade, or assemble. A challenge under this doctrine can be mounted in "cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker." *Id.* at 129. The district court concluded that terms such as "undue influence" and "appropriate or normal" in the recruiting rule are so undefined and provide TSSAA with such arbitrary discretion that the rule is an impermissibly overbroad regulation.

TSSAA first attempts to avoid a challenge under the overbreadth doctrine by arguing that the recruiting rule regulates commercial speech. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982) ("the

overbreadth doctrine does not apply to commercial speech"). It claims that because Brentwood is a private school, recruiting students is a commercial activity. We agree with the district court that the recruiting rule does not invoke the commercial speech analysis. The "test for identifying commercial speech" involves determining whether a regulation relates to a "commercial transaction." *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989) (determining that America Future Systems, Inc.'s "tupperware party"-like lectures on its housewares in college dormitories constituted commercial speech, and remanding the case for review under the intermediate scrutiny standard); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993) (striking down a city's selective and categorical ban on the distribution, via newsrack, of "commercial handbills" as violative of the First Amendment).

We conclude that TSSAA's argument in this regard is unpersuasive. Brentwood is an educational institution. The fact that it is private does not render its academic, athletic, and spiritual goals commercial. Nor is TSSAA able to cite any authority in support of its "commercial transaction" argument as applied to the recruiting of student athletes by a private school. Because we conclude that the recruiting rule does not constitute a regulation of commercial speech, we must now turn to TSSAA's alternate contention that the rule is not unconstitutional under the overbreadth doctrine.

"A facial challenge to a legislative Act, is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). The Supreme Court has set forth the following

principles for evaluating facial challenges under the overbreadth doctrine:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

"To succeed . . . the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates*, 455 U.S. at 497. Cases that have held legislation unconstitutional on its face under the overbreadth doctrine, moreover, have not created "any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984); *see also Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989) ("It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily — that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary

means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws.").

In our opinion, the district court erred in striking down the recruiting rule as facially overbroad without focusing on how the rule was applied to Brentwood. We turn now to this analysis. TSSAA found that Brentwood's two violations of the recruiting rule consisted of admitting middle school athletes free of charge to an athletic contest at Brentwood and of contacting middle school students to inform them of Brentwood's athletic practices before they were enrolled there. In particular, the second violation arose from Coach Flatt's letter to incoming students regarding spring football practice and followup telephone calls to the students. Pursuant to Article II, Section 1(b) of TSSAA's Bylaws, a student is not considered "enrolled" until he or she has attended the school for at least three days. None of the incoming students met this criterion.

Both of Brentwood's alleged violations are explicitly listed as prohibited conduct that constitutes "undue influence" in the commentary accompanying the recruiting rule. As previously noted, the seventh example in response to question four under the recruiting rule includes "admitting students to athletic contests free of charge where there is an admission being charged at the contest . . . ." Furthermore, the third question following the recruiting rule prohibits a coach from contacting students not enrolled in their school:

> Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?
>
> A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school.

> This shall apply to all students whether or not they have an athletic record.

These questions, answers, and guidelines are entitled to consideration in evaluating an overbreadth challenge. *See Forsyth County*, 505 U.S. at 131 ("In evaluating [the] facial challenge, we must consider the [association's] authoritative instructions of the [rule], including its own implementation and interpretation of it."); *see also Ward*, 491 U.S. at 794-96 (holding that the city's sound-amplification guideline and the city's interpretation of the guideline provided sufficient limiting instructions to render the ordinance's statements ensuring the "best sound" and "appropriate sound quality" immune from an overbreadth challenge). We also note that the Supreme Court has

> repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.

Parker v. Levy, 417 U.S. 733, 760, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974) (internal quotation marks omitted and ellipses in original).

The above principles are fully applicable to the case before us. Although the recruiting rule by itself is certainly subject to challenge based on vagueness and overbreadth, it is accompanied by the equivalent of two full pages of question-and-answer explanations and guideline interpretation. As a whole, the rule gives reasonable notice of what is prohibited, especially as applied to Brentwood. The interpretive commentary explicitly states that free tickets cannot be provided to prospective students, nor can

a coach initiate contact with potential players before they enroll in the school. Brentwood allegedly did both of these things, and was punished accordingly. To claim now that the rule is overbroad as applied to Brentwood strains credulity. We therefore conclude that the district court erred in holding the recruiting rule unconstitutional on the basis of being facially overbroad.

F. Remand is required to determine if the recruiting rule is narrowly tailored to meet TSSAA's substantial interests

As set forth in Part II.D. above, we have determined that the recruiting rule is a content-neutral regulation subject to intermediate scrutiny for the purpose of First Amendment analysis. This means that TSSAA has the burden of establishing (1) the legitimacy of its alleged substantial governmental interests and (2) that the recruiting rule as applied to Brentwood in the case before us is narrowly tailored to further these governmental interests. The Supreme Court has described this analysis as follows:

> [A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation . . . . The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

Ward, 491 U.S. at 798-800 (internal quotation marks, alterations, and ellipses omitted).

In TSSAA's response to Brentwood's motion for summary judgment, TSSAA asserted two interests in justification of the recruiting rule: (1) to keep high school athletics in their proper place subordinate to academics and (2) to protect student athletes from exploitation. TSSAA proffered an additional interest on appeal, namely that of fostering a level playing field between the various member schools. This latter interest seeks to establish a degree of competitive equity in high school athletics by regulating how the member schools recruit student athletes.

This court previously recognized the validity of TSSAA's first asserted interest when it concluded that "[TSSAA] is ordinarily entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life." *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 386-87 (6th Cir. 1992). The district court below also acknowledged this interest as a substantial one. TSSAA's other two justifications, however, are very much in dispute.

Brentwood, for example, argues that there is no support in the record for the proposition that student athletes need protection from exploitation. The district court agreed. It concluded that TSSAA offered no proof that exerting undue influence on middle school athletes to recruit them for athletic purposes actually *harms* those students. Proof of actual harm, however, is not required in order to recognize a state actor's interest in preventing reasonably anticipated harm. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 565-66 (6th Cir. 2001) (holding that the village could regulate door-to-door solicitation based on a fear of an "anticipated harm" without proof of actual harm). Finally, TSSAA's newly asserted interest in a level playing field has obviously not been evaluated by either Brentwood or the district court.

The legitimacy of TSSAA's "exploitation" and "level playing field" interests cannot be decided in the abstract as a matter of law. We therefore remand this case to the district court for an evaluation of these asserted interests after TSSAA has had the opportunity to present whatever support it deems appropriate to justify its position.

After the district court decides if either or both of the above interests are legitimate, it should then apply those interests, along with TSSAA's recognized interest in keeping high school athletics in their proper place, to the alleged recruiting rule violations that TSSAA enforced against Brentwood. Its task will be to decide if the punishment exacted for these alleged violations relating to the free game tickets, spring football-practice letters, and the followup telephone calls was appropriate regulatory action narrowly tailored to further TSSAA's legitimate interests as a state actor. This question is also one that cannot be decided in the abstract as a matter of law. TSSAA should therefore be given the opportunity to present whatever support it deems appropriate to justify the need for such regulations. In proceeding with this case on remand, we caution both the parties and the district court to stay focused on the two alleged recruiting rule violations in question, rather than engage in a wide-ranging attack or defense of the recruiting rule as a whole.

G. The status of Ronnie Carter

As a final point, we note that the district court did not draw any distinction between TSSAA and Ronnie Carter, the Executive Director of TSSAA, in its grant of partial summary judgment to Brentwood. TSSAA now urges us to reverse the district court's judgment to the extent that it operates against Carter in his individual capacity. We decline to do so. Such action by us at this time would be premature, because the district court's opinion is silent on the issue of Carter's liability. We therefore direct the district court on remand to address the issue of Brentwood's

claim against Carter in both his official and individual capacities.

III. CONCLUSION

For all of the reasons set forth above, we REVERSE the grant of summary judgment in favor of Brentwood and REMAND the case to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

BRENTWOOD ACADEMY

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, AND RONNIE CARTER, EXECUTIVE DIRECTOR AND INDIVIDUALLY

No. 3:97-1249.

Decided: January 13, 2003.
Entered: January 13, 2003.

Before TODD J. CAMPBELL, United States District Judge.

OPINION
MEMORANDUM

I. INTRODUCTION

Brentwood Academy has sued the Tennessee Secondary School Athletic Association ("TSSAA") and Ronnie Carter, TSSAA's Executive Director, alleging that the TSSAA Recruiting Rule, as written and applied, violates the *First* and *Fourteenth Amendments* and Tennessee law. The general background of this case is set forth in four reported opinions. *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n.*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998); *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n.*, 180 F.3d 758 (6th Cir. 1999); *Brentwood*

Academy v. Tennessee Secondary Schools Athletic Ass'n., 531 U.S. 288, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001); and *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n.*, 262 F.3d 543 (6th Cir. 2001). The Supreme Court held that the TSSAA is a "state actor" subject to the Constitution and 42 U.S.C. § 1983. The Court of Appeals for the Sixth Circuit then ruled that the Recruiting Rule "on its face" does not violate the *First Amendment.* The case was remanded for trial to determine if the Recruiting Rule "as applied" to Brentwood Academy violates the *First Amendment.* Also to be tried were the following additional claims that were not determined by the Court of Appeals: Substantive Due Process, Procedural Due Process, Equal Protection, and Tennessee law.[1]

The Court held a ten day bench trial commencing December 11, 2002. For the reasons described herein, the Court finds that the Recruiting Rule, as applied to Brentwood Academy, is unconstitutional in violation of the *First Amendment* and the *Fourteenth Amendment of the Constitution.* The Court further finds that Brentwood Academy's right to due process under the *Fourteenth Amendment* was violated. Therefore, the August 23, 1997 penalties imposed by the TSSAA against Brentwood Academy are void and enjoined.

This does not mean that the TSSAA cannot or should not have a Recruiting Rule. The TSSAA has demonstrated that it has substantial governmental interests in having a Recruiting Rule. Brentwood Academy agrees that there should be a strong Recruiting Rule. In this case, however, the Recruiting Rule as applied to Brentwood Academy was not narrowly tailored to achieve the TSSAA's legitimate

---

[1] Brentwood Academy also asserted various antitrust claims against the TSSAA. This Court, on remand, dismissed the antitrust claims against the TSSAA based on immunity because the TSSAA, for all practical purposes, is a subdivision of the state regarding its regulatory activity over interscholastic athletics. (Order, Docket No. 254).

governmental interests. The Recruiting Rule also was applied without due process.

This Memorandum shall constitute the findings of fact, and conclusions of law, required by Fed. R. Civ. P. 52.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *First Amendment* — As Applied.

The Court of Appeals for the Sixth Circuit remanded this case to determine if the Recruiting Rule is narrowly tailored to meet the TSSAA's alleged substantial governmental interests as applied to Brentwood Academy. *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n.*, 262 F.3d 543 (6th Cir. 2001). The TSSAA has the burden of establishing (1) the legitimacy of its alleged substantial governmental interests and (2) that the Recruiting Rule as applied to Brentwood Academy is narrowly tailored to further these governmental interests. *Id.*

The Sixth Circuit held that the Recruiting Rule is a content-neutral regulation subject to intermediate scrutiny for purposes of the *First Amendment.* The Sixth Circuit also ruled that the Recruiting Rule is not facially overbroad in violation of the *First Amendment.* The Recruiting Rule, being content-neutral and subject to intermediate scrutiny, must be narrowly tailored to serve substantial governmental interests. The Recruiting Rule does not need to be the least restrictive alternative, but it cannot unreasonably limit alternative avenues of communication under the *First Amendment. Id.*[2]

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[2] Defendants suggest that the speech at issue is this case is not a matter of "public concern." The Court finds, and the Sixth Circuit has already determined, that under the content-neutral, intermediate scrutiny standard, the substantial governmental interests of the TSSAA by definition implicate speech that is a matter of "public concern" for purposes of the *First Amendment. Id.* The Sixth Circuit also held in this case that "commercial speech analysis" does not apply. *Id.* at 555.

The TSSAA has asserted three governmental interests to justify the Recruiting Rule: (1) to keep high school athletics in their proper place subordinate to academics; (2) to protect student athletes from exploitation; and (3) to foster a level playing field between schools for competitive equity. The first interest — keeping athletics in their proper place subordinate to academics — has already been established. *Id.*

The Recruiting Rule in dispute is a one paragraph provision contained in Section 21 of the TSSAA's Bylaws:

> Recruiting Rule
>
> Section 21. The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

(Plaintiff's Exhibit 63; Defendant's Exhibit 68).

Following the Recruiting Rule is interpretive commentary divided into Questions and Answers and "Guidelines":

> 1.
>
> Q. How is undue influence interpreted in the recruiting rule?
>
> A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.
>
> 2.
>
> Q. What is the penalty for violation of the recruiting rule?
>
> A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

a. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

b. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of

financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

c. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/ athlete enrolled in any member school except where there is a definite feeder pattern.

d. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/ athlete in the seventh grade and above at any nonmember school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where

there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

e. Any contact between a member of the coaching staff or representative of the school and prospective student/ athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

f. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.).

g. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines for Understanding The "Recruiting Rule" and Understanding "What Is Undue Influence?"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different

> reason. High school coaches should not view 12-, 13-, 14-year old students in the same manner as college coaches view high school seniors.
>
> 8. Administrators and coaches must realize that they have more responsibilities than the general public to understanding the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

Id. The TSSAA testified, through Ronnie Carter and members of the Board of Control, that the interpretive commentary is not a binding interpretation of the Recruiting Rule and that the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary.

The TSSAA contends that the term "enrolled" used in the Recruiting Rule is defined in its Bylaws at Article II (Eligibility Rules), Section 1 (Academic Rules) as follows:

> Academic Rules
>
> Section 1. To be eligible to participate in athletic contests during any semester:
>
> ...
>
> (b) Students shall be regularly enrolled, in regular attendance, and carrying at least five full courses. A student shall be considered as regularly enrolled after the student has attended for three days, has engaged in three or more days of football, girls volleyball, cross country, golf or girls soccer practice during the period on or after August 1, or has participated in an athletic contest in any sport.

(Defendant's Exhibit 68). Plaintiff denies that this definition of "enrolled" applies to the Recruiting Rule.

The TSSAA found, among other things, that a Spring Practice Letter (Plaintiff's Exhibit 8) sent by Brentwood

Academy to all incoming ninth grade male students, whose parents had signed enrollment contracts, violated the Recruiting Rule. It is undisputed that each of the twelve students who received the Spring Practice Letter previously had applied, been tested and admitted, and signed an enrollment contract with Brentwood Academy. In addition, all the students not applying for financial aid had paid a $ 300 deposit to the school. It is also undisputed that the letter went to all incoming male students, not just student athletes.

The Spring Practice Letter states:

BRENTWOOD ACADEMY

219 Granny White Pike Brentwood, Tennessee 37027

(615) 377-3632 fax: (615) 377-3709

Athletic Director: Carlton Flatt Asst. Athletic Director: Buddy Alexander

April 23, 1997

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.

Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:20 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-

0475. We are certainly glad that you decided to become an Eagle.

Your Coach,

Carlton Flatt

Id. The TSSAA also found that certain follow-up telephone calls by Carlton Flatt about the Spring Practice Letter violated the Recruiting Rule.

On July 29, 1997, Defendant Ronnie Carter, the Executive Director of the TSSAA, determined that Brentwood Academy violated the Recruiting Rule and imposed penalties that were effective immediately. (Plaintiff's Exhibit 86). Brentwood Academy filed an appeal which was heard by Carter along with three members of the Board of Control: Mike Hammond, Morris Rogers, and Mickey Dunn. Brentwood Academy made a presentation at this appeal hearing, but the TSSAA presented no evidence. On August 14, 1997, Carter, with the advice and consensus of the three members of the Board of Control, again found Brentwood Academy in violation of the Recruiting Rule and imposed revised penalties. (Plaintiff's Exhibit 87). Carter testified at trial that the three Board of Control members were merely advisors, but two of the members of the Board of Control (Morris Rogers and Mickey Dunn) testified that they believed they were decision-makers, rather than advisors to Carter at this hearing.

Brentwood Academy then filed a final appeal to the entire Board of Control. The Board of Control consisted of nine members, including the three members who participated in the prior decision that was the subject of the appeal. Again, Brentwood Academy made a presentation to the Board of Control at a public hearing, and the TSSAA presented no evidence. Following the presentation by Brentwood Academy, the Board of Control deliberated in private "executive session." The credible evidence at trial

establishes that during the private deliberations, Carter and the two TSSAA employees who had investigated the case — Gene Menees and Bernard Childress — answered questions from the Board of Control. Brentwood Academy was excluded from the deliberations.

On August 23, 1997, the Board of Control found that Brentwood Academy had violated the Recruiting Rule and imposed new penalties. The Board of Control's ruling provides as follows:

> This letter is in response to your appeal before the Board of Control at the Sheraton Music City on Aug. 23, 1997.
>
> First, on behalf of the entire Board I commend you and those who appeared on behalf of your school as they delivered information to us. Our Board took time to thoroughly review all the information that was presented today and that had been previously submitted to the state office.
>
> After reviewing and having a detailed discussion on all of the information, the Board's determination is that the following violations of TSSAA regulations occurred:
>
> 1. Student-athletes have been admitted free of charge to athletic contests.
>
> 2. Contact with student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools.
>
> 3. Brentwood Academy coaches conducting impermissible off-season practice with Brentwood Academy student-athletes.
>
> The details of each of the foregoing violations have been described in previous correspondence from TSSAA Executive Director Ronnie Carter. In order to communicate the decision of the Board of Control to you as soon as possible, I will not take

the time to reiterate the factual details of the foregoing violations.

The Board of Control has determined that the appropriate penalty for the foregoing violations are as follows:

1. The entire athletic program of Brentwood Academy will be on probation for four years. If there are further violations during the probationary period, TSSAA will have no choice but to take further disciplinary action.

2. Brentwood Academy's football and boys' basketball programs are suspended from the TSSAA playoff series for the 1997-98 and 1998-99 school years.

3. Brentwood Academy is fined $ 3,000 for the above violations.

4. The Brentwood Academy football and boys' basketball programs will not be permitted to engage in off-season practice in the 1997-98 and 1998-99 school years.

5. Appropriate administrative officials of Brentwood Academy will meet with the TSSAA Executive Director to develop an administrative control plan to help guard against future problems like those which precipitated this action.

The portion of the previous penalty pertaining to tournament series revenue has been removed. In addition, the Board of Control has decided that no student-athletes should be declared ineligible based on the foregoing violations provided they meet all other eligibility requirements.

Notwithstanding the modifications of the previous penalties by the Board of Control, the foregoing violations are serious. While there is no indication of a deliberate intent to violate TSSAA rules by

> Brentwood Academy officials, the Board of Control concurs with the Executive Director's concern about a lack of appropriate administrative control in various aspects of the school's athletic program. These concerns will have to be addressed in the administrative control plan to be developed.

(Plaintiff's Exhibit 88).[3]

Testifying before this Court, Carlton Flatt, Athletic Director and Football Coach of Brentwood Academy, stated that the Spring Practice Letter went to all incoming ninth grade male students who had applied, been tested and admitted, and signed enrollment contracts with Brentwood Academy. This is undisputed. One student (Jacques Curry) who had been accepted by Brentwood Academy, but had not signed an enrollment contract, was not sent the Spring Practice Letter. Approximately 95% of the students who sign enrollment contracts in the spring attend in the fall, according to Flatt. The Spring Practice Letter was sent to all incoming ninth grade male students to avoid singling out any students, particularly Ray Marley, who had been cleared by Ronnie Carter to lift weights at Brentwood Academy even though he was a student at Grassland Middle School. It is also undisputed, and admitted by Ronnie Carter, that participation at spring football practice by the incoming Brentwood Academy students was permissible under the TSSAA rules.

Flatt further testified that after the Spring Practice Letter was mailed, he got a "couple of calls" from parents regarding attendance. In order to make sure all parents knew that spring practice was optional, Flatt made follow-up telephone calls to that effect. Flatt received no complaints from parents about the Spring Practice Letter or calls. Flatt did not consider the Spring Practice Letter to be

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[3] The TSSAA's finding of a violation of the offseason practice rule is not contested by the parties.

"recruiting" because the recipients of the letter had already completed the enrollment process and thereby indicated that they were coming to school at Brentwood Academy.

Elizabeth Tate, current Admissions Director for Brentwood Academy, testified about the enrollment process used at the school. Tate also testified that independent schools by their nature must recruit students and must take every opportunity to "tell their story" to prospective and incoming parents and students.

Ellen Goldring, a Peabody Professor and "school choice" expert, testified for Plaintiff. Goldring stressed the importance of schools providing information to parents in order for parents to make informed school choices. She further testified that the TSSAA's Recruiting Rule is educationally outdated because of the growth of school choice options. Beyond zoned public schools and independent schools, current school choice offerings include magnet schools; charter schools; liberal transfer policies among public schools based on curricula; open enrollment; and transfer from low performing public schools pursuant to the new "No Child Left Behind" federal law. Independent school choices include religious schools, single gender schools, and boarding schools. Various types of specialized magnet schools (e.g., math, science, arts, and literature) are available. Charter schools will begin to operate in Tennessee this fall. Home schooling is also an option.

Goldring testified that the flow of information from schools to parents, as decision-makers, is very important to making informed school choices about both where to attend and the options available at the school that is ultimately selected. According to Goldring, the government should not be in the business of protecting specific schools from choices by parents. Goldring sees no harm in school-initiated targeted information to parents. The Recruiting Rule is inconsistent with informed school choice, according to Goldring.

Goldring opined that preventing exploitation is a significant governmental interest. She stated, however, that the Spring Practice Letter and follow-up calls were merely the free flow of harmless information and not exploitive. Goldring saw no reason to distinguish between information that can be provided by a school to parents inside a feeder pattern from information that can be provided by a school to parents outside a feeder pattern. The Spring Practice Letter, according to Goldring, does not harm a "level playing field."

Nancy Brasher, the Admissions Director for Brentwood Academy at the time of the events in question, testified consistent with Carlton Flatt about the particulars of the mailing of the Spring Practice Letter. Brasher actually mailed the Spring Practice Letter to all new, incoming ninth grade male students who had completed the enrollment process. Carlton Flatt did not have the students' names.

Brasher also testified about the overall enrollment process at Brentwood Academy. Once an enrollment contract is signed, incoming students get all mailings that all other Brentwood Academy students receive in order to integrate the new students into the school. Brasher stressed the need for the school to communicate with its incoming students for the well-being of the students. Brasher does not believe that the Spring Practice Letter was exploitive or harmful in any respect. Last year, only 8 of 700 students who signed enrollment contracts in the spring did not attend in the fall, according to Brasher.

John Slaughter, father of a Brentwood Academy student who received the Spring Practice Letter, stated that the Spring Practice Letter was not harmful or exploitive. Slaughter testified that "we recruited Brentwood Academy," not vice versa. Joe Marley, Grassland Middle School Football Coach and father of another Brentwood Academy student, Ray Marley, who received the Spring Practice Letter, testified that the Spring Practice Letter

was not inappropriate and that his son was already planning to attend spring practice. Both Slaughter and Marley stated that upon signing the Brentwood Academy enrollment contract, their school choice was final. Marley testified how the "feeder school" exception actually works in practice at public schools.

George Pitts, former public school coach (Science Hill) and current Brentwood Academy Basketball Coach, testified about how public high school coaches typically contact public middle school students in their feeder pattern under the Recruiting Rule. Pitts, in particular, testified about initial contact by coaches. Board of Control members Mike Hammond, Mickey Dunn and Morris Rogers testified similarly about the existence of the "feeder pattern" exception and how it works with public schools.

Ellis Haguewood, Headmaster of Memphis University School, testified about the importance of private schools communicating with students who have signed enrollment contracts. Haguewood had no reservations about the Spring Practice Letter or follow-up calls. He stressed that private schools see enrollment and matriculation differently. Haguewood testified that the TSSAA's definition of enrollment (attendance for three days) is a public school definition unworkable for private schools.

Milbrey Ganick, mother of a Brentwood Academy student who received the Spring Practice Letter, testified that the Spring Practice Letter was not coercive, threatening, or harassing. She called Carlton Flatt to confirm that participation was optional. Her son, Chandler Ganick, a Brentwood Academy student, testified that the Spring Practice Letter was just a harmless form letter. It did not influence his decision to attend Brentwood Academy, because he was already planning to attend.

Harry Allan, another Brentwood Academy parent, was "thrilled" to get the Spring Practice Letter. Allan did not

consider the Spring Practice Letter inappropriate or harmful and it did not influence him to send his child to Brentwood Academy, since that decision was made upon signing the enrollment contract. Allan considered the Spring Practice Letter a standard form letter. He was "excited" to get the letter and was "desperate" to get information about the various programs at the school.

Michael Obel-Omia, Admissions Director at the Roxbury Latin School in Massachusetts, testified as an expert witness for the Plaintiff. Obel-Omia stressed the importance of private schools reaching out in targeted ways to recruit students, particularly to achieve diversity. Obel-Omia saw nothing inappropriate or harmful about the Spring Practice Letter or calls.

Jim Guthrie testified as an education expert for Plaintiff. Guthrie's testimony was consistent with Goldring's. Guthrie stressed the need for schools to provide parents with information to make informed school choices about what school to attend and the options available at the school selected. Guthrie opined that the Recruiting Rule is not consistent with the modern imperatives of education. Guthrie did not perceive the Spring Practice Letter or follow-up calls as exploitive. Guthrie opined that prevention of exploitation is a substantial governmental interest as it relates to misleading, harassing, or coercing conduct.

The testimony of Hulon Watson, Superintendent of Rutherford County Schools and former Riverdale High School Principal, exemplified the hostility between public schools and private schools regarding athletics. Watson testified that Defendant Ronnie Carter was aware of the general hostility and suspicion of public schools toward private schools regarding athletics, which eventually resulted in a split into two divisions for certain TSSAA playoffs. Watson was a motivating force for the split.

Watson also testified about how the "feeder pattern" exception works in practice at public schools. The football coach of Riverdale High School sent incoming students within its feeder pattern a summer practice "Warrior" letter (Plaintiff's Exhibit 104) substantially similar to the Spring Practice Letter. Watson testified that the "Warrior" letter was "appropriate and normal" and not "undue influence." Bernard Childress, Assistant Athletic Director of the TSSAA, however, testified that the "Warrior" letter violated the Recruiting Rule. Mike Reed, President of the Board of Control, on the other hand, testified that the "Warrior" letter was not a problem.

Otis Cosby, father of another Brentwood Academy student who received the Spring Practice Letter, testified that he was pleased to get the Spring Practice Letter and that he did not consider it harmful. Cosby further testified that the decision to send his son to Brentwood Academy was made at the time he signed the enrollment contract.

Defendant Ronnie Carter, the Executive Director of the TSSAA, testified that the Spring Practice Letter and follow-up calls were harmful undue influence because of their contents: the letter came from a famous coach; the letter assumed an incorrect definition of "enrollment"; Brentwood Academy was not the student's new team yet; the phrase "if you are not currently involved in a sport" places undue emphasis on sports to the exclusion of other things; the phrase "inconvenience to your parents" does not consider inconvenience to the student; the phrase "definitely be to your advantage" really means practice is not an option; the coach's home number is included; and the reference to becoming an "Eagle" is inappropriate since the student is not yet attending the school.[4] Carter testified that

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[4] The Court finds that the preponderance of the credible evidence at trial is that the substantive "content" of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted "undue influence" and violated the

participation in spring practice did not violate the Recruiting Rule.

Carter testified that preventing "exploitation" is the "fundamental" purpose of the Recruiting Rule. He stated that competitive equity is also a purpose of the Recruiting Rule. Carter stated that the definition of enrollment applied in the Recruiting Rule by the TSSAA is "tied to eligibility" for participation. (Defendants' Exhibit 68, pp. 28-29). The Board of Control is the "final authority" on interpreting the Recruiting Rule, but it delegates interpretive authority to the Executive Director.

Carter further testified that the interpretive commentary to the Recruiting Rule is not a binding interpretation of the Recruiting Rule and that he, the Executive Director, and the Board of Control, both have the discretion to disregard the interpretive commentary. He stated that he does not "look at feeder patterns" to determine "undue influence" Recruiting Rule violations. "Singling out" a student-athlete is what "school people" understand is prohibited by the Recruiting Rule, Carter said.

Carter testified that Brentwood Academy violated TSSAA "institutional control" requirements, but he admitted that "institutional control" is not mentioned in the TSSAA Bylaws. Carter stated there can be a violation of the Recruiting Rule without an "intent" to violate.[5] Approximately 82,000 student-athletes and 370 schools, including about 50 private schools, participate in the TSSAA. No official of the State of Tennessee has directed or ordered the TSSAA in any way concerning the Recruiting Rule or the interpretive commentary, or

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Recruiting Rule. The TSSAA penalized Brentwood Academy for the substantive "content" of the Spring Practice Letter and calls and the message they conveyed in this case.

[5] Carter failed to explain how he could determine whether influence was "for athletic purposes" without considering intent.

identified the governmental interests to be protected by the Recruiting Rule.[6] The TSSAA has not done any studies on the harm of recruiting. Carter stated that the absence of any Recruiting Rule would result in a "war zone" and coaches' resignations. He stated that "the rich would get richer real quick" if there is no prohibition on recruiting.

Curtis Masters, who became Headmaster of Brentwood Academy in July, 2002, testified that Brentwood Academy wants a strong TSSAA Recruiting Rule. He stated, however, that the Recruiting Rule needs to be clear, applied equally, and allow Brentwood Academy to "tell its story" to prospective and incoming students.

Sharon Kay Stoll, a professor in sports ethics, testified as an expert witness for Defendants. Stoll opined that a Recruiting Rule is necessary to have a level playing field and to eliminate the "specialness" of athletics. She stated that a Recruiting Rule promotes a level playing field because it gives an equal opportunity to compete. A Recruiting Rule also enhances the totality of the school experience by not placing too much recognition on athletes. Stoll opined that the Spring Practice Letter is benign outside the sports world, but inside the sports world it is harmful because it makes athletes something special. Stoll evaluated the content of the Spring Practice Letter as harmful, consistent with Ronnie Carter's testimony. Stoll's position is that all athletic recruiting should be prohibited.

Jack Roberts, the Executive Director of the Michigan equivalent of the TSSAA, also testified as an expert witness for Defendants. Roberts opined that a Recruiting Rule is necessary to prevent exploitation and to maintain a level playing field for competitive equity. Roberts used the

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[6] Pursuant to *Tenn. Code Ann.* §§ 8-6-109 and 8-6-110, and 28 U.S.C. § 2403, the Attorney General of Tennessee was advised of this case. The Attorney General did not file a motion to intervene. (Order, Docket No. 251).

NCAA as a model for a place state high school athletic associations "don't want to go" because of the complexity of its Recruiting Rule. Roberts testified that sports has too large a role in American life and that professional sports is an unrealistic goal for high school athletes. He stated that a Recruiting Rule is necessary for a level playing field because losing games all the time diminishes the students' willingness to compete, and recruiting creates an "arms race" among schools. Roberts opined that the content of the Spring Practice Letter and follow-up telephone calls was harmful for the same reasons stated by Ronnie Carter in his testimony. Roberts opined that there should be no recruiting for athletic purposes or targeted communication for athletics.

George Sage, a professor emeritus in the sociology of sports, testified as an expert witness for Defendant. He opined, like the Defendants' other experts, that a Recruiting Rule is necessary to prevent exploitation and to foster a level playing field for competitive equity. Sage also gave a brief history of sports in America. Sage cautioned not to "open the door" to recruiting as the NCAA has. Sage evaluated the content of the Spring Practice Letter and follow-up calls as harmful on the same basis as Ronnie Carter in his testimony.

Charles Thomas McMillen, a former star basketball player and Congressman, and a life-long student of sports, testified as an expert witness for Defendant. McMillen opined that the NCAA Recruiting Rule is a guide for what type of rule should be avoided. McMillen stated that the Spring Practice Letter and calls were harmful both to parents and students. McMillen evaluated the content of the Spring Practice Letter as harmful, consistent with Ronnie Carter's testimony. McMillen opined that recruiting "warps the value systems" of students; creates an unhealthy "subculture;" produces adverse health consequences; leads to commercialization; and provides no benefits. McMillen,

who is not a lawyer, opined that schools should be required to give up free speech rights just as he believes government contractors do. McMillen's position is that all athletic recruiting should be prohibited.

Glen McCadams, Dean of Students and Football Coach for David Lipscomb, a private religious school, testified in favor of a strong recruiting rule. McCadams also testified about how the "feeder pattern" exception works to allow feeder school coaches to recruit middle school students. He stated that the TSSAA is a "club of schools."

Austin Clark, Athletic Director and Basketball Coach for Baylor private boarding school in Chattanooga, testified for Defendants. The Recruiting Rule is important because "only the haves will have" if recruiting is permitted, according to Clark. He opined that athletic recruiting has no place in high school sports. Clark also stated that the Recruiting Rule is difficult to follow.

Barbara Daush, the President of St. Agnes Academy, a private religious school in Memphis and ex officio member of the Board of Control, testified that the Recruiting Rule is necessary to prevent the exploitation of students.

Bill Brown, former Headmaster of Brentwood Academy at the time of the events in question, testified that Brentwood Academy signed contracts each year to be a TSSAA member and to comply with TSSAA Rules. Brown testified that it is critical for the school to contact its students after their parents sign enrollment contracts to get the students acclimated to the school. Brown also stated that, at times, students who sign enrollment contracts with Brentwood Academy do not ultimately attend for various reasons. Brown testified that fair competition is an important goal of the TSSAA. According to Brown, the TSSAA and its Bylaws are dominated and controlled by public school interests.

Bill Brown further testified that no athletic recruiting should be permitted "period." He stated that Brentwood Academy, prior to the appeals, knew the general charges by the TSSAA but not the sources or details of the charges. According to Brown, the appeal hearings were not "fair." Brown stated that this lawsuit was brought to clear Brentwood Academy's name and to allow Brentwood Academy to tell its mission story to prospective and incoming families without violating the Recruiting Rule.

1. Governmental Interests

This case involves the intersection of the *First Amendment*, education and athletics.

This Court previously found that the TSSAA has a substantial governmental interest in keeping high school athletics "in their proper place" subordinate to academics. This finding was affirmed by the Court of Appeals on cross-motions for summary judgment. Now, after a more fully developed record at trial, this Court reconfirms this finding of fact and conclusion of law.

The Court also finds as a matter of fact, and concludes as a matter of law, that the TSSAA has a substantial governmental interest in protecting student athletes from "exploitation." The parties disagree about what constitutes "exploitation."

The Court further finds as a matter of fact, and concludes as a matter of law, that the TSSAA has a governmental interest in fostering a "level playing field" between schools for "competitive equity," but this interest is less significant than the TSSAA's substantial interests in subordinating athletics to academics and preventing exploitation. The TSSAA does not have a substantial governmental interest in preventing or discouraging students from moving from one school to another for academic or educational purposes, in whole or in part, in order to foster competitive equity in athletic contests. The

substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests.[7] Academics are more important than athletics.

The *First Amendment* question thus becomes whether the Recruiting Rule, as applied to Brentwood Academy, is narrowly tailored to further the three identified governmental interests.

2. Not Narrowly Tailored

The TSSAA found Brentwood Academy violated the Recruiting Rule by "contact with student-athletes, initiated by Brentwood Academy, while these students were enrolled at other schools." (Plaintiff's Exhibit 88). The Recruiting Rule, which prohibits "undue influence" for athletic purposes, does not expressly prohibit such "contact." The "contact" violation is based on Question 3 (no coach "contact"), and Question 4, Examples 3 ("no initial contact"), and 4 ("private ... schools may not contact students enrolled at the public schools"), and Question 1 ("exceeding what is appropriate and normal") of the interpretive commentary. (Plaintiff's Exhibit 63). ("The details of each of the foregoing violations have been described in previous correspondence from TSSAA Executive Director Ronnie Carter," Plaintiff's Exhibit 88; see the July 29, 1997 (Plaintiff's Exhibit 86) and August 14, 1997 (Plaintiff's Exhibit 87) letters of the TSSAA regarding violations.)

For the reasons described herein, the Court finds, as a matter of fact, and concludes as a matter of law, that the Recruiting Rule (Article II, Section 21, Plaintiff's Exhibit 63) is not narrowly tailored to further any of the three governmental interests of the TSSAA as applied to

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[7] Board of Control member Morris Rogers also testified in deposition that a purpose of the Recruiting Rule was to protect schools and coaches from other schools taking their students. This is not a legitimate governmental interest in this case.

Brentwood Academy. Inclusion of the interpretive commentary does not save the Recruiting Rule.[8] The Court further finds as a matter of fact, and concludes as a matter of law, that the interpretive commentary (e.g., Questions 1 and 3 and Question 4, Examples 3 and 4) does not make the Recruiting Rule narrowly tailored to further any of the three governmental interests of the TSSAA as the Recruiting Rule was applied to Brentwood Academy in this case. The Recruiting Rule, therefore, is unconstitutional as applied to Brentwood Academy based on the facts in this case.

The Court finds that the Spring Practice Letter (Plaintiff's Exhibit 8) and the follow-up telephone calls are consistent with and do not violate the TSSAA's legitimate governmental interests. The Spring Practice Letter and calls caused no actual harm and did not reasonably threaten harm to students, parents, or any legitimate governmental interests. The Spring Practice Letter and calls simply were harmless informational speech about a permitted athletic practice from a private school to all the parents of all the male students who had applied, been tested and admitted, and signed enrollment contracts, students who had already decided to attend Brentwood Academy. The Spring Practice Letter and calls did not "single out" students since they went to all the families of all the male students who had completed the enrollment process.[9] The Spring Practice Letter and calls were "appropriate" and "normal" speech for a school and they did not constitute "undue influence." They

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[8] For instance, Ronnie Carter and members of the Board of Control testified that the interpretive commentary to the Recruiting Rule is not binding and that the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary and have done so.

[9] Certain statements made by Board of Control members and some of Defendants' experts demonstrate a misunderstanding of this undisputed fact.

are an example of "due," rather than "undue," influence, as testified by the parents of these students.

The Spring Practice Letter and calls did not elevate athletics over academics. Neither students nor parents were exploited in theory or in fact. Nothing in the communications from Brentwood Academy to the parents of incoming students violated competitive equity, since the athletic practice at issue was clearly permitted by the TSSAA. Neither the content of the Spring Practice Letter or calls, nor the act of a coach contacting parents and students about spring practice, was adverse to the TSSAA's legitimate governmental interests.

The failure of the TSSAA to narrowly tailor the Recruiting Rule, as applied in this case, is made further evident by the "feeder pattern" exceptions that exist in the interpretive commentary to the Recruiting Rule. As applied in this case, there is no legitimate reason to permit speech in a feeder pattern but prohibit the same speech by Brentwood Academy to its incoming students.[10] Various witnesses testified about how the "feeder pattern" exception for public school is actually used to broadly permit the type of speech for which Brentwood Academy has been sanctioned by the TSSAA. The bottom line is that schools in a "feeder pattern" can make certain school-initiated,

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[10] The Court finds as a matter of fact, and concludes as a matter of law, that "feeder pattern" exceptions to the Recruiting Rule exist and have been applied by the TSSAA. *See, e.g.*, Recruiting Rule, Question 4, Examples 3, 4, and 5. The preponderance of the credible testimony is that the "feeder pattern" exceptions have long existed and have been applied by the TSSAA and relied upon by member schools. (See testimony of Board of Control members Mike Reed, Mike Hammond, and Mickey Dunn regarding their understanding of the "feeder pattern" exception; and testimony of George Pitts, Joe Marley, John Slaughter, and Harry Allan as to actual incidents of contact within the "feeder pattern.") The Sixth Circuit has also recognized the "feeder-school exemption" and that Brentwood Academy has no "feeder pattern with any school." 262 F.3d at 548.

targeted speech that schools, such as Brentwood Academy, outside the "feeder pattern," cannot make. The Recruiting Rule, therefore, is under-inclusive of speech as applied to Brentwood Academy.

The Court further finds, and concludes as a matter of law, that the TSSAA broadly and unconstitutionally applied the Recruiting Rule to Brentwood Academy over what is essentially post-recruiting activity. This is especially troublesome. The parents and students who received the Spring Practice Letter and calls had already completed any "recruiting" process since the students had applied, been tested and admitted, and signed enrollment contracts. The TSSAA did not have a substantial governmental interest in regulating this post-recruiting speech by Brentwood Academy to these students who had completed the enrollment process in this case. This post-recruiting application of the Recruiting Rule to Brentwood Academy was not narrowly tailored to further any legitimate governmental interests of the TSSAA.[11] The post-recruiting application of the Recruiting Rule to Brentwood Academy also was not a narrowly tailored time, place, and manner restriction on Brentwood Academy's constitutional right to speak.[12]

The Defendants contest whether the Brentwood Academy enrollment contracts were binding as a matter of

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[11] The fact that the Recruiting Rule expressly applies "to retain" as well as "to secure" students for athletic purposes does not alter the balance of constitutional interests as applied to Brentwood Academy. On the facts of this case, the TSSAA had no narrowly tailored legitimate governmental interest in preventing or discouraging speech by Brentwood Academy to "retain" these students who had completed the enrollment process.

[12] Additionally, the post-recruiting application of the Recruiting Rule was not narrowly tailored to control any "secondary effects" of Brentwood Academy's speech in this case. Also, the application of the Recruiting Rule to Brentwood Academy in this case is with reference to the content of the speech and the impact of the speech.

Tennessee contract law.[13] For purposes of the *First Amendment*, however, this contract issue is not outcome determinative. By the point at which the parents signed the enrollment contracts, the balance of constitutional interests tipped in favor of Brentwood Academy being able to communicate with the incoming students, whether or not the students somehow might wiggle out of their contracts, and weighed against the TSSAA's legitimate governmental interests. Brentwood Academy had a substantial and superior constitutionally protected *First Amendment* interest in communicating with the incoming students about all aspects of the school, including sports, so that the parents and students could make informed choices about education.

Defendants stress that Brentwood Academy "voluntarily" signed contracts wherein the school agreed to comply with TSSAA Rules. However, the Sixth Circuit has already held in this case that Brentwood Academy "has not waived its right to challenge the constitutionality of the recruiting rule by voluntarily joining TSSAA." 262 F.3d at 551.

The Defendants' suggestion that Brentwood Academy should either leave the TSSAA or change the TSSAA rules does not remedy the constitutional violation. The TSSAA is effectively the only game in town for the same reasons the TSSAA is a state actor. Also, the amendment of the Recruiting Rule or the definition of "enrolled" is not within the control of Brentwood Academy. Neither Brentwood Academy nor any private school was on the Legislative Council at the time in question. In any event, and as the Sixth Circuit has already held in this case, Brentwood Academy cannot be forced to waive its *First Amendment* rights. *Id.*

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[13] The Sixth Circuit has already recognized in this case that the students at issue had "contractually agreed to attend" *Brentwood Academy*. 262 F.3d at 548.

The Recruiting Rule, as applied to Brentwood Academy, also unreasonably prohibited avenues of communication — one form letter and one follow-up call — that were not intrinsically coercive, threatening, harassing, or otherwise harmful.[14] The face-to-face communication permitted and practiced in the "feeder patterns" has a greater potential for "undue influence" and exploitation than the Spring Practice Letter and calls.

Finally, the Court further finds as a matter of fact, and concludes as a matter of law, that the punishment exacted for the alleged violations by Brentwood Academy relating to the Spring Practice Letter and follow-up calls was not appropriate regulatory action narrowly tailored to further the governmental interests of the TSSAA as a state actor for the above reasons.

In summary, for purposes of the *First Amendment*, the Recruiting Rule "as applied" to Brentwood Academy in this case is unconstitutional.[15] The Recruiting Rule is not narrowly tailored to achieve the legitimate governmental interests of the TSSAA as applied to Brentwood Academy based on the facts in this case. Judgment shall enter for

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[14] In contrast, the TSSAA permitted face-to-face communication with a middle school student who had not signed an enrollment contract. When Coach Joe Marley wanted his middle school son to lift weights with the Brentwood Academy football team, where face-to-face communication with both coaches and students would clearly occur routinely, Ronnie Carter told Carlton Flatt to just get a letter (Plaintiff's Exhibit 7) from the father indicating his intent to send the student to Brentwood Academy and it would be permissible.

[15] Defendants argued at closing argument that this case should not be in federal court and that only the lawyers will benefit from it. The United States Supreme Court found this case belongs in federal court when it found the TSSAA to be a state actor. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001). It is one of the roles of federal courts to interpret the *First* and *Fourteenth Amendments* and prevent unconstitutional state action. The TSSAA, as a state actor, controls more than 82,000 students and 370 schools which participate in TSSAA-governed sports. The TSSAA is not, and should not be, beyond judicial review.

Brentwood Academy against the TSSAA on the *First Amendment* "as applied" claim.[16]

B. Substantive Due Process

The TSSAA also found that Brentwood Academy violated the Recruiting Rule because "student-athletes have been admitted free of charge to athletic contests." (Plaintiff's Exhibit 88). The Recruiting Rule does not expressly prohibit "free admission" to games. The violation is based on Question 4, Example 7 of the interpretive commentary:

> Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

(Plaintiff's Exhibits 63, 86 and 87).

For the reasons stated herein, the Court finds as a matter of fact, and concludes as a matter of law, that the Recruiting Rule, including the interpretive commentary, violates substantive due process as applied to Brentwood Academy regarding the complimentary tickets at issue here.

The U.S. Supreme Court has held that the *Fourteenth Amendment* guarantees more than fair process; it also covers a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 1713, 140 L. Ed. 2d 1043 (1998). The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable

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[16] The Recruiting Rule was enacted by the TSSAA commencing in the 1930's (Plaintiff's Exhibits 74-77 and 61-62) and ultimately enforced by the Board of Control, not Defendant Ronnie Carter (Plaintiff's Exhibit 88). Accordingly, any *First Amendment* "as applied" claim against Defendant Carter, individually, is dismissed.

justification in the service of a legitimate governmental objective. *Id.* at 1716. "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action." *Id.*[17]

In *Collins v. Harker Heights*, the Supreme Court noted that the *Due Process Clause* was intended to prevent government officials from abusing their power or employing it as an instrument of oppression. *Collins*, 503 U.S. 115, 112 S. Ct. 1061, 1069, 117 L. Ed. 2d 261 (1992). Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986).[18] The asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial or fundamental fairness may, in other circumstances, and in the light of other considerations, fall short of such denial. *Lewis*, 118 S. Ct. at 1719.

The Sixth Circuit Court of Appeals has stated that substantive due process is a "doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992). Liability will attach to conduct intended to injure which is in some way unjustifiable by any governmental interest. *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (2002) (citing *Lewis*).

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[17] History reflects the traditional and common sense notion that, like its forebearer in the Magna Carta, the *Due Process Clause* was intended to secure the individual from the arbitrary exercise of the powers of government. *Daniels v. William*, 474 U.S. 327, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986).

[18] For example, the Court explicitly observed that citizens have a substantive due process right not to be subjected to arbitrary and irrational zoning decisions. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 562, 50 L. Ed. 2d 450 (1977).

Along with establishing a protected property or liberty interest, a plaintiff must demonstrate that it was the victim of a governmental action that was arbitrary, irrational, or tainted by improper motive in order to show a substantive due process violation. *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 124 (3d Cir. 2000). Evidence that the government acted improperly for reasons unrelated to the merits of its decision may support a finding that the government arbitrarily or irrationally abused its power in violation of substantive due process. *Id.* In disputed factual situations, the determination of the existence of improper motive or bad faith is properly made by the finder of fact. *Id.*

Substantive due process serves as a vehicle to limit various aspects of potentially oppressive government action, *Valot v. Southeast Local School District Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997), and involves the right not to be subject to arbitrary or capricious action by a state either by legislative or administrative action. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 641 (6th Cir. 2001).[19]

A substantive due process analysis must begin with a careful description of the asserted property or liberty right. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772, 117 S. Ct. 2302 (1997); *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993).

The Court finds as a matter of fact, and concludes as a matter of law, that Brentwood Academy had a property interest, at a minimum, in the three thousand dollar ($ 3,000) fine assessed against it by the TSSAA (Plaintiff's Exhibit

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[19] For example, the Sixth Circuit has acknowledged a cognizable substantive due process claim where plaintiffs alleged damages caused by an irrational municipal agency action. *Oakwood Homeowners Ass'n v. City of Mackinac Island*, 2000 U.S. App. LEXIS 25258, 2000 WL 1434708 at ** 2 (Sept. 20, 2000).

88). *See, e.g., Contractors Against Unfair Taxation Institution on New Yorkers v. City of New York*, 1994 U.S. Dist. LEXIS 11799, 1994 WL 455553 (S.D.N.Y. Aug. 19, 1994) (property interest in money allegedly exacted for payment of fines for traffic violations); *Jones v. Cowley*, 948 F.2d 1294 (10th Cir. 1991) ("Certainly, there is no doubt that the $ 15 fine is a deprivation of a property interest."); *Murray v. Dosal*, 150 F.3d 814 (8th Cir. 1998) (inmate has property interest in money received from outside sources). Brentwood Academy also had a property interest in the post-season basketball tournament revenue that it would have received but for the suspension imposed by the TSSAA. *Id.* Ronnie Carter and Carlton Flatt both testified that all TSSAA basketball teams are tournament eligible and receive certain minimum revenue.

Brentwood Academy was deprived of its property interests immediately upon issuance of the July 29, 1997 letter (Plaintiff's Exhibit 88) from the TSSAA since the penalties were effective immediately.

In this case, the credible evidence at trial established that Kevin Armstrong, an assistant football coach at Neely's Bend Middle School, called Carlton Flatt for complimentary tickets to a Brentwood Academy football game. Armstrong and Flatt had never met or spoken. The Court credits the testimony of Flatt and Armstrong[20] that, at the time these tickets were discussed and used, Armstrong had never mentioned any prospective student athletes to Flatt. Armstrong told Flatt that he intended to take his adult girlfriend and her adult sister to the game. Flatt, in accordance with prior policy, arranged for tickets to be available in Armstrong's name at a "will call" ticket window. Flatt specifically told Armstrong that the tickets could be used by only adults, not by students.

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[20] Flatt and Armstrong are the only witnesses with personal knowledge of telephone calls between them.

Armstrong's intended adult guests ultimately were unable to attend the game. Armstrong testified that at the suggestion of the head football coach at Neely's Bend, Armstrong decided to take three student football players (Jesse Kellogg, Glean Eddy, and Courtney Hale) to the Brentwood Academy game as a reward for a good season. Because Eddy was an "at-risk" student, Armstrong had been designated his "mentor" by the principal of Neely's Bend and was "like a father" to him. It is undisputed that Armstrong never informed Carlton Flatt, or anyone at Brentwood Academy, that Armstrong intended to or did use the complimentary tickets for two students in contravention of Flatt's express instructions.

Armstrong took the three football players to the game. Armstrong made Eddy pay for his own ticket, with Eddy's own money, because Eddy had an interest in maybe attending Brentwood Academy. Armstrong identified himself at the "will call" ticket window and obtained the three complimentary tickets previously put there in his name.[21] Armstrong, without informing anyone at Brentwood Academy, used one ticket for himself and the other two tickets for Kellogg and Hale to be admitted to the game. Brentwood Academy charged five dollars ($ 5.00) admission to the game. Armstrong and the students sat in bleacher seats with other spectators. Neither Armstrong, nor any of the students, spoke to Carlton Flatt or any other Brentwood Academy coach.

As an initial matter, the Court finds that Brentwood Academy did not violate the express language of Question 4, Example 7 of the interpretive commentary to the Recruiting Rule.[22] Carlton Flatt gave complimentary

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[21] The tickets were not given to the "wrong" person or to middle school students at the ticket window.

[22] Carter testified that the problem with the complimentary tickets was "singling out" the students. Brentwood Academy did not single these students out; Armstrong did.

tickets to another coach, not to students, as a professional courtesy. Armstrong gave the tickets to the students, without any knowledge of Brentwood Academy, after being expressly told that the tickets could be used only by adults.

The Court finds as a matter of fact, and concludes as a matter of law, that the Recruiting Rule, as applied to Brentwood Academy regarding the complimentary tickets, violates substantive due process.

As applied, the Recruiting Rule did not give Brentwood Academy constitutionally adequate notice that providing tickets to another coach, who secretly disregards express instructions to use the tickets only for adults, will constitute a violation. The Recruiting Rule is unconstitutionally vague as applied to Brentwood Academy on the facts of this case.

It is a basic principle of due process that a rule, regulation or law is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972). The Recruiting Rule prohibition concerning free admission, as applied to Brentwood Academy under the facts presented at trial, is not clearly defined. As noted by the Sixth Circuit in this case,[23] the *Grayned* opinion states that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 2298-99. Here, the Recruiting Rule did not give a person of ordinary intelligence, specifically Brentwood Academy, a reasonable opportunity to know what was prohibited with regard to complimentary tickets so that it could act accordingly. Specifically, as noted above, Brentwood Academy was not

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[23] The Sixth Circuit specifically cited *Grayned* with regard to the *First Amendment* facial challenge. 262 F.3d 543, 555. Nonetheless, the principles concerning due process are also on point with regard to the Recruiting Rule "as applied" to Brentwood Academy.

adequately advised that providing complimentary tickets to a middle school football coach, with expressed instructions that they be used for adults only, could result unwittingly in a penalty against Brentwood Academy. Neither did the Recruiting Rule advise Brentwood Academy that specific monitoring procedures may be required at the ticket booths and gates.

Grayned also states that vague laws may trap the innocent by not providing fair warning. *Id.* at 2299. Under the facts of this case, the Recruiting Rule failed to provide fair warning that Brentwood Academy could be punished for the acts of a middle school football coach who, unbeknownst to Brentwood Academy, gave the complimentary tickets to students, even though he had been specifically told to use the tickets for adults only. In addition, the Recruiting Rule failed to provide fair warning to Brentwood Academy that, as applied to them, the Recruiting Rule required specific monitoring procedures at the ticket windows and gates in order to avoid being punished for a violation by a non-Brentwood Academy person.[24]

Finally, *Grayned* holds that in order to avoid arbitrary and discriminatory enforcement, laws must provide explicit standards for those who apply them — in this case, Ronnie Carter and the TSSAA Board of Control. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* Here, there are no explicit standards; rather, Brentwood Academy was held strictly liable for all tickets to its game, regardless of who actually

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[24] The evidence at trial was that the TSSAA does not have any specific procedural requirements or protocols for complimentary tickets or admissions. In any event, neither the Recruiting Rule, nor the Bylaws, gave Brentwood Academy fair warning or notice of any required "institutional control" for complimentary tickets or admissions.

provided them to students. Brentwood Academy could not predict how the rule would be interpreted and applied to it.

Furthermore, the Court finds, as a matter of fact, and concludes as a matter of law, that the TSSAA Bylaws provide no explicit standards as to the penalties to be imposed for Recruiting Rule violations. Ronnie Carter, TSSAA Executive Director, testified that the penalty section was taken out of the Recruiting Rule and penalties rest in the sound discretion of the Executive Director. The Bylaws provide specific penalties for some violations — e.g., Article II, Sections 10 and 32; Article III, Sections 5, 6 and 8 — but no specific penalties or standards for punishing violations of the Recruiting Rule.

Question 2 following the Recruiting Rule states, in response to an inquiry about penalties for violations, that violation of the Recruiting Rule "shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school." It does not say how long the student is ineligible or what range of or specific penalties may be imposed upon a school. As applied to Brentwood Academy, the students were not held to be ineligible and the penalty, undefined and unlimited in the rule, included a $3,000 fine, "probation" for four years, and suspension of the football and men's basketball teams from the TSSAA playoff series for two years. (Plaintiff's Exhibit 88).

Although specific fines are imposed for certain other violations, *see, e.g.*, Article III, Sections 5, 6, and 8, which specify a $ 25.00 fine for violation of those sections, no ranges or guidelines are provided in the TSSAA Bylaws for determining a fine for a Recruiting Rule violation. Carter testified that he must have "just cause" to fine a school, but there is no definition of "just cause" in the rules and there are no standards by which to judge what amount of fine should be imposed. As applied to Brentwood Academy in this case, the Recruiting Rule gives no fair warning that the school could be assessed a $ 3,000 fine for a violation. No

specific fine in the TSSAA Bylaws exceeds $ 25. Brentwood Academy had inadequate notice of the range of fines which could be imposed in the unfettered discretion of the Executive Director or Board of Control.

Moreover, "probation" is never even mentioned in the TSSAA Bylaws, much less identified as an available penalty. It is, in fact, unclear as applied to Brentwood Academy in this case, what "probation" means. Carter testified at trial that probation did not mean anything as a punishment except maybe a "heightened awareness." At best, heightened awareness would also mean heightened vulnerability of Brentwood Academy. Probation has to mean something or it would not have been imposed on Brentwood Academy by the TSSAA.[25] Brentwood Academy had no fair warning or notice from the Bylaws of what exactly would be required of it during its probationary period or how probation would, in fact, work. For these reasons, applying a penalty of "probation" to Brentwood Academy in this case was arbitrary.

The Court also finds that the Recruiting Rule, as applied to Brentwood Academy, violated substantive due process because it gives no notice that strict liability will be imposed without regard to scienter. Likewise, the Recruiting Rule does not give constitutionally adequate notice that strict liability will be imposed even when a school has no knowledge of the facts upon which the violation is based. Again, the Recruiting Rule is unconstitutionally vague as applied to Brentwood Academy due to this lack of notice.

The history of the application of the "free admission" example in the interpretive commentary of the Recruiting

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[25] The August 23, 1977 letter (Plaintiff's Exhibit 88) imposes on Brentwood Academy, as the first penalty, "The entire athletic program of Brentwood Academy will be on probation for four years. If there are further violations during the probationary period, TSSAA will have no choice but to take further disciplinary action." See also Plaintiff's Exhibits 86 and 87.

Rule does not clarify the Recruiting Rule. Brentwood Academy had no access to prior precedent or knowledge about prior TSSAA rulings. Moreover, the credible evidence at trial showed that the Recruiting Rule has been inconsistently applied. For instance, the TSSAA found no violation against Father Ryan High School in a substantially similar instance of free admission. (Plaintiff's Exhibit 127).

In addition, Bernard Childress and Gene Menees, Assistant Executive Directors of the TSSAA, testified that the principals of two schools can simply agree to grant students free admission to games notwithstanding Question 4, Example 7 of the interpretive commentary of the Recruiting Rule. The history of arbitrary and selective enforcement of the Recruiting Rule makes the Recruiting Rule more, rather than less, vague as applied in this case.[26]

Several defense witnesses testified that the remedy for any questions about the Recruiting Rule is to "just pick up the telephone" and call Ronnie Carter of the TSSAA. Constitutional rights, however, do not pivot on telephone calls. In addition, Ronnie Carter testified that any advice that he gives by telephone is non-binding on the TSSAA or him and cannot be relied upon as a defense to a violation of the Recruiting Rule.

For the reasons described above, the Court finds that the Recruiting Rule as applied to Brentwood Academy in this case violates the substantive due process guarantee of the *Fourteenth Amendment.* Judgment shall enter for Brentwood Academy against the TSSAA on the *Fourteenth Amendment* substantive due process "as applied" claim regarding the complimentary tickets.[27]

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[26] The lack of notice and history of selective enforcement also "tilts" the "level playing field," contrary to the TSSAA's stated governmental interest in competitive equity.

[27] For the reasons stated previously regarding the *First Amendment* "as applied" claim, the *Fourteenth Amendment* substantive due process

C. Procedural Due Process

The Court finds as a matter of fact, and concludes as a matter of law, that the TSSAA Board of Control considered ex parte, post-hearing evidence during its private deliberations, to which Brentwood Academy had no right of reply, in violation of the procedural due process rights of Brentwood Academy.

As discussed above, after the final hearing, the Board of Control deliberated in private, outside the presence of Brentwood Academy. During the private deliberations, the Board of Control received, considered, and relied upon ex parte statements and documentary evidence from Defendant Carter and two TSSAA employees who investigated the allegations against Brentwood Academy: Gene Menees and Bernard Childress. Brentwood Academy had no opportunity to reply to this ex parte evidence or even hear it and was prejudiced by the evidence and the private post-hearing process.

Bernard Childress and Gene Menees, Assistant Executive Directors of the TSSAA, participated in the investigation of the alleged violations, and the details of their investigation were not disclosed to Brentwood Academy prior to the final hearing. Mr. Childress testified that at the direction of Ronnie Carter, he interviewed Jacques Curry and others at East Middle School about Bart King allegedly recruiting Curry and others to attend Brentwood Academy. Childress also talked to coaches at Cameron and Goodlettsville Middle Schools about alleged recruiting of students by John Patton and King. Curry told Childress that he was recruited by several other private schools. Childress never talked to Bart King or John Patton or investigated the other schools.

"as applied" claim, regarding the complimentary tickets, against Defendant Carter, individually, is dismissed.

Childress testified that, at the first appeal, Brentwood Academy asked to cross-examine Childress, but Ronnie Carter refused by stating that the hearing was a meeting of "school people" about "school issues" and not a court.

Childress further testified that during the private deliberations after the final hearing, the Board of Control members asked Childress questions and he answered the questions. Childress was "sure" that questions were asked by the Board of Control and that Childress answered the questions during the private deliberations. Finally, Childress testified that Carter informed the Board of Control at the final appeal hearing that "everything was open" and that the Board of Control was not bound by Carter's previous decisions or penalties.

Menees[28] testified that he interviewed coaches at Neely's Bend Middle School, which is not a member of the TSSAA, and student Jesse Kellogg. Menees said he never talked to Bart King because "we are school people dealing with school people." Menees testified that during the private deliberations of the Board of Control he did not answer questions, but he does not contest that the Board of Control had copies of his investigative notes at or before the deliberations. He stated that there is animosity between public and private schools in the TSSAA regarding athletics.

Carter testified that during the private deliberations after the final hearing, Carter, Menees and Childress were all present to answer questions from the Board of Control. Carter does not "recall" any questions that were asked and answered or many of the key events in question. Carter testified that the hearings are not a "burden of proof setting" but instead are where "school people" decide how to solve "school problems." He testified that he informed the

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[28] Menees' sister is Ronnie Carter's assistant and his brother-in-law was a coach at Hunters Lane High School for which Neely's Bend is a feeder school.

Board of Control that his decision was "wiped out" and that the decision by the Board of Control was to be "totally new." Carter testified at trial that he was aware during the appeals that courts previously had held that the TSSAA is a state actor.

On the other hand, Board of Control member Mike Hammond testified that the Board of Control, in its private deliberations, considered evidence presented by Menees and Childress and that Carter advised and answered questions. Mickey Dunn, also a Board of Control member, stated that Childress discussed his interviews of witnesses and that Carter and Childress answered questions during the private deliberations. Board of Control member Morris Rogers testified that Carter, Menees and Childress all answered questions posed by the Board of Control during its private deliberations. Finally, Board of Control President Mike Reed testified that Childress and Menees provided information, including the results of witness interviews, to the Board of Control during the private deliberations. Bart King, according to Reed, was discussed and King was a factor in the penalties imposed.[29] The Court credits this evidence based on the demeanor of the witnesses, the consistency of the testimony, and because the testimony is adverse to the witnesses' interests as TSSAA Board of Control members.

Finally, Tom Nebel, an attorney for Brentwood Academy during the administrative appeals, testified that Brentwood Academy did not hear the evidence presented in

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[29] There was no indication from the TSSAA before the final hearing, however, that the organization was still considering the Bart King allegations. (*See, e.g.*, August 14, 1997 letter from Carter to Brown (Plaintiff's Exhibit 87); Carter testimony; Defendant's Answer at P 70 (Docket No. 8)). Thus, the TSSAA and Carter misled Brentwood Academy about a person and allegation which ultimately mattered to the decision. Brentwood Academy was denied an opportunity to defend this allegation head on.

the private post-hearing deliberations. Nebel further testified that Brentwood Academy had not seen Gene Menees' notes or Bernard Childress' notes before the final appeal. (Plaintiff's Exhibits 93-96). He stated that Carter refused to tell Brentwood Academy who was "singling out" students for athletic purposes, and Brentwood Academy did not know what evidence Carter's decision was based upon. Carter admitted at trial that he never told Brentwood Academy the names of its accusers. According to Nebel, Carter advised him that Brentwood Academy had the burden of proof during the appeals. Nebel advised the Board of Control at the final hearing that Bart King was present to testify if the Board of Control wanted King's testimony. The transcript reveals that Carter answered "no," and King did not testify at the hearing. (Transcript of Proceedings on August 23, 1997 before the TSSAA Board of Control, at 90-91 (Plaintiff's Exhibit 134)).

As discussed previously, for purposes of due process, Brentwood Academy had a property interest in the three thousand dollar ($ 3,000) fine levied against it by the TSSAA, as well as certain post-season tournament revenues. Therefore, the TSSAA was required to comply with procedural due process before depriving Brentwood Academy of that property interest.

Brentwood Academy was deprived of its property interests immediately upon issuance of the July 29, 1997 letter (Plaintiff's Exhibit 88) from the TSSAA since the penalties were effective immediately. The two appeals by Brentwood Academy of the July 29, 1997 penalties were, therefore, post-deprivation hearings for purposes of the *Fourteenth Amendment* due process.

Defendants contend that procedural due process, in this context, only required the "right-of-reply" type of hearing discussed in pre-deprivation cases. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). As the penalties imposed in this case took

effect, depriving Brentwood Academy of its property interests, immediately upon issuance of the July 29, 1997 letter from the TSSAA, however, the Court is not persuaded that the final hearing before the Board of Control was a "pre-deprivation" hearing. Consequently, the "right-of-reply" line of cases is not necessarily applicable here.

Even if those cases were applicable, however, a meaningful right-of-reply hearing is impossible if the plaintiff is not informed of the evidence considered by the decision-maker. *See, e.g., Loudermill*, 105 S. Ct. at 1495 ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." (emphasis added)); *Moore v. Board of Education of the Johnson City Schools*, 134 F.3d 781, 785-86 (6th Cir. 1998)("[The plaintiff] received written notice of the charges against her, as well as an explanation of the Board's evidence, and was offered an opportunity to present her side of the story." (emphasis added)); *Duchesne v. Williams*, 849 F.2d 1004, 1005 (6th Cir. 1988)(Plaintiff permitted to cross examine employer's witnesses at pre-termination hearing).

With exceptions not applicable here, "ex parte presentation of evidence denies due process. . ." *Swank v. Smart*, 898 F.2d 1247, 1253 (7th Cir. 1990) (citing *Greene v. McElroy*, 360 U.S. 474, 496-97, 79 S. Ct. 1400, 1413-14, 3 L. Ed. 2d 1377 (1959)). "A fair hearing includes the right to be shown the evidence on which the tribunal has relied . . . including evidence pertaining to the gravity of the sanction to be imposed when liability is conceded." *Swank*, 898 F.2d at 1256 (citations omitted). See also *Newsome v. Batavia Local School District*, 842 F.2d 920, 927-28 (6th Cir. 1988)(advising the decision-maker of evidence during closed deliberation session deprived plaintiff opportunity to rebut the evidence and "amounted to a clear deprivation of his right to procedural due process of law."); *Fraternal Order of Police v. Tucker*, 868 F.2d 74, 80 (3rd Cir. 1989)(*Loudermill*

requires a meaningful pre-termination hearing which must include "a sufficient explanation of the employer's evidence to permit a meaningful response."); *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) ("...the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.").

The Court also is not persuaded by the Defendants' contention that the type of hearing in this case, among "school people about school issues" is deserving of less process than that involved in the cases cited above. In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976), the Supreme Court devised a policy-oriented analysis that balances three competing factors in determining whether proposed procedural safeguards should be required: (1) the private interest that will be affected by the official action; (2) the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burden that the additional or substitute procedural requirements would entail.

Applying *Matthews* here, the Court concludes that requiring the TSSAA to present its evidence of a rules violation in the presence of the school alleged to have committed the violation is a fundamental procedural safeguard that would have imposed no, or a very modest, additional administrative burden on the organization, and would have "contributed substantially to the making of a rational decision. . ." *Swank*, 898 F.2d at 1255. Moreover, it is clear that the ex parte, post-hearing evidence was unfairly prejudicial to Brentwood Academy. For instance, the President of the TSSAA, Mike Reed, testified that the ex parte, post-hearing evidence from Childress and Menees affected the overall penalty, especially the fine and probation. The missing procedural safeguards, therefore,

had a high value and were necessary to protect the constitutional interests of Brentwood Academy.[30]

For the reasons described above, the Court concludes that the Defendants violated Brentwood Academy's right to procedural due process under the *Fourteenth Amendment*, and judgment shall enter for Brentwood Academy on that claim.

Given the above finding that the TSSAA and Ronnie Carter have violated Brentwood Academy's procedural due process rights, the Court does not reach the other alleged procedural due process violations asserted by Brentwood Academy.

D. Qualified Immunity

Defendant Ronnie Carter has asserted a qualified immunity defense for the claims against him individually. Carter testified that he was personally aware that courts had previously held that the TSSAA is a state actor for purposes of 42 U.S.C. § 1983. Carter actively participated in and helped manage the hearing process. Carter also provided ex parte information to the Board of Control during its private deliberations by answering questions posed by members of the Board of Control.

The Court finds that Defendant Carter, as an employee of a private athletic association, is not entitled to qualified immunity from suit by Brentwood Academy charging a violation of 42 U.S.C. § 1983 and the Constitution. Judicial history does not reveal a firmly rooted tradition of immunity applicable to employees of private athletic associations, and the purposes of the qualified immunity doctrine do not warrant immunity for employees of private athletic

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[30] In addition, Carter testified that after the final appeal hearing, a school can ask to appear before the Board of Control again. Nothing in the TSSAA's Bylaws provides for such a right, and Brentwood Academy had no fair notice in the Bylaws of the availability of such a procedure. In any event, Brentwood Academy has exhausted any required administrative remedies.

associations. *Richardson v. McKnight*, 521 U.S. 399, 138 L. Ed. 2d 540, 117 S. Ct. 2100 (1997).[31]

In any event, the Court finds that Defendant Carter is not entitled to qualified immunity on Brentwood Academy's procedural due process claim. When qualified immunity is asserted, the Court must conduct a two-step inquiry. The first step is to decide whether the Complaint alleges a violation of a constitutionally protected right. *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). The Complaint in this case alleges a violation of a constitutionally protected right, procedural due process, for the reasons stated above. The second step is to ask whether the right was "clearly established" at the time of the violation. *Hinchman v. Moore*, 312 F.3d 198, 205 (6th Cir. 2002). In this case, the contours of procedural due process were sufficiently clear and apparent that Carter had fair warning, and reasonably should have understood, that what he did violated the procedural due process rights of Brentwood Academy. Carter testified that he was aware that the TSSAA had been declared a state actor subject to the Constitution prior to the hearing. For the reasons described previously regarding procedural due process, it was clearly established prior to this case that presentation and consideration of ex parte, post-hearing evidence violates procedural due process.[32] Carter acted objectively

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[31] The Court is not persuaded that Defendant Carter's reliance on the Sixth Circuit's decision in *Bartell v. Lohiser*, 215 F.3d 550 (6th Cir. 2000) requires a different result. The Lohiser Court held that a private foster care contractor and private social workers who contracted with the state to provide a recommendation about whether a mother was fit to parent were entitled to qualified immunity. 215 F.3d at 555-57. The court concluded that the Defendants were private persons performing a discrete public service task at the express direction and under close supervision of the state. *Id.*, at 557. Carter has not made such a showing in this case.

[32] In the event the Court of Appeals determines that qualified immunity could apply, this Court would find that Defendant Carter is entitled to qualified immunity on Brentwood Academy's *First*

unreasonably in light of Brentwood Academy's clearly established right to procedural due process and, therefore, is not entitled to qualified immunity.

E. Damages.

Brentwood Academy seeks damages for the cost of repairing its reputation because it has been characterized wrongly as a "cheater" in the media. It also seeks compensation for the time that its employees have spent on matters arising from this litigation over the last five years. The damages claimed exceed six hundred thousand dollars ($ 600,000).

Carlton Flatt testified that he has spent between 300 to 400 hours on this case in the last five years. John Van Mol, an expert witness, stated that it would take a $ 350,000 media campaign to fix Brentwood Academy's reputation. Tom Seigenthaler, also an expert witness, estimated $292,000 in media damages. Mark McFerran, Director of External Affairs at Brentwood Academy, estimated that he has spent 900 hours on this matter and that his assistant, Leah Hoskins, has spent 620 hours on it. McFerran also testified that Brentwood Academy has paid Steve Brumfield $ 115,000 of $ 159,000 owed for media consulting. Curtis Masters, who became Headmaster for Brentwood Academy in July, 2002, testified that the school's reputation has been harmed significantly by media reports. The harm has impacted image, admissions, alumni, new faculty, donations and all other aspects of the life of the school, according to Masters.

In order to recover damages under Section 1983, Brentwood Academy must prove, by a preponderance of the evidence, that the Defendants' actions or inactions proximately caused the injuries and damages sustained by Brentwood Academy. A proximate cause is a cause which,

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Amendment claim. Brentwood Academy's *First Amendment* rights regarding the TSSAA were not clearly established prior to this litigation.

in natural and continuous sequence, produces the injury, and without which the injury would not have occurred. *See, e.g.*, T.P.I. 3-Civil 3.20. A wrongful act gives rise to no liability for damages unless it is the proximate cause of the injury of which Brentwood Academy complains. *Id.*

The Court finds that the damages claimed by Brentwood Academy were not proximately caused by Defendants TSSAA or Ronnie Carter.

The damage to Brentwood Academy's reputation was caused by non-party media reports. Neither the TSSAA nor Ronnie Carter controls the media.

The costs of employees working on matters arising from this litigation are the price of litigation that Brentwood Academy caused when it filed this case.

As discussed above, the Court has found that the Recruiting Rule, as applied to Brentwood Academy by the TSSAA, is unconstitutional in violation of the *First Amendment* and the *Fourteenth Amendment to the Constitution.* The Court also has found that Brentwood Academy's substantive and procedural due process rights under the *Fourteenth Amendment* were violated. The appropriate remedy for these violations of Brentwood Academy's constitutional rights is to enjoin the penalties imposed by the TSSAA. Accordingly, the August 23, 1997 penalties (Plaintiff's Exhibit 88) imposed by the TSSAA against Brentwood Academy are void and enjoined.[33]

F. Other Constitutional Claims.

Brentwood Academy has alleged that the Recruiting Rule, "as written and as applied to Brentwood Academy, violates the equal protection guarantee under the *Fourteenth Amendment.*" Joint Proposed Pre-Trial Order

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[33] The penalties imposed by the TSSAA on Brentwood Academy (Plaintiff's Exhibit 88) were not itemized by type of violation. All sanctions imposed, therefore, must be set aside to ensure that Brentwood Academy's constitutional rights are not infringed.

(Docket No. 279, p. 5); Amended Complaint (Docket No. 205, Count VII). The equal protection claim has not been addressed by the Court of Appeals because the claim was added by Amended Complaint after this case was remanded to this Court.

Brentwood Academy has also alleged that the Recruiting Rule "as written" violates the "substantive due process guaranteed under the *Fourteenth Amendment.*" Joint Proposed Pretrial Order (Docket No. 279, p. 5); Complaint (Docket No. 1, Count II). It is unclear whether the Court of Appeals definitively ruled on this substantive due process "facial challenge" when it held that the Recruiting Rule did not violate the *First Amendment* on its face.[34]

It is axiomatic that a Court should not rule upon constitutional questions unnecessarily. *See, e.g., Olympic Arms v. Buckles*, 301 F.3d 384, 388 (6th Cir. 2002). Given the other rulings of this Court in favor of Brentwood Academy, it is unnecessary for the Court to reach the equal protection ("as written and as applied") and substantive due process ("as written") issues. Accordingly, the Court declines to make findings of fact or conclusions of law on these issues.

G. State Law Claim.

Brentwood Academy has alleged that the TSSAA's conduct towards Brentwood Academy "violates Tennessee state law prohibiting unfair, unreasonable, arbitrary and oppressive action." Joint Proposed Pre-Trial Order (Docket No. 279, p. 5); Complaint (Docket No. 1, Count VI). The

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[34] The Court finds that the TSSAA Executive Director, the Assistant Executive Director, and the Board of Control members gave inconsistent and contradictory testimony about how to interpret and apply the Recruiting Rule and the interpretive commentary. Compare the testimony of Mike Hammond, Mickey Dunn, Morris Rogers, Ronnie Carter, Mike Reed, Robert Baldridge, Bernard Childress and Gene Menees.

Tennessee law on "unfair, unreasonable, arbitrary and oppressive action" is not clearly developed. *See, e.g., Nashville St. Ry. v. Griffin*, 104 Tenn. 81, 57 S.W. 153 (Tenn. 1900); *Underground II v. City of Knoxville*, 1998 Tenn. App. LEXIS 78, 1998 WL 46447 (Tenn. Ct. App. Feb. 4, 1998). Pursuant to 28 U.S.C. § 1367, the Court declines to exercise supplemental jurisdiction over the state law claim because it raises novel issues of state law. Accordingly, the Court does not make findings of fact or conclusions of law on this issue.

III. SUMMARY

For the reasons described above, the Court finds that judgment shall enter for Brentwood Academy against the TSSAA on the *First Amendment* "as applied" claim; the *Fourteenth Amendment* Substantive Due Process "as applied" claim; and the *Fourteenth Amendment* Procedural Due Process claim.

Judgment shall enter for Brentwood Academy against Ronnie Carter, individually, on the *Fourteenth Amendment* Procedural Due Process claim. Judgment shall enter for Ronnie Carter, individually, on the *First Amendment* "as applied" claim and the *Fourteenth Amendment* Substantive Due Process "as applied" claim.

It is unnecessary for the Court to reach the *Fourteenth Amendment* Equal Protection "as written and as applied" claim or the Substantive Due Process "as written" claim. The Court declines to take supplemental jurisdiction over the state law claim.

As relief for the above constitutional violations, the August 23, 1997 penalties (Plaintiff's Exhibit 88) imposed by the TSSAA against Brentwood Academy are declared void and enjoined.

The parties are again encouraged to amicably settle their differences. The parties shall advise the Court if they jointly want further Court-sponsored alternative dispute resolution.

IT IS SO ORDERED.
01-13-03
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,
PLAINTIFF-APPELLEE/CROSS-APPELLANT

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, EXECUTIVE DIRECTOR AND IN HIS INDIVIDUAL CAPACITY,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES.

NOS. 03-5245/5278.

Argued: December 7, 2004.
Decided: March 17, 2006.
Filed: March 17, 2006.

Before GIBBONS and ROGERS, Circuit Judges; BELL, Chief District Judge.

OPINION

JULIA SMITH GIBBONS, Circuit Judge:

This appeal represents the third trip to this court for the parties to this litigation. The case has also been before the United States Supreme Court, which made a notable ruling that defendant-appellant Tennessee Secondary School Athletic Association ("TSSAA") was a state actor.

The parties' dispute began when the TSSAA imposed a number of penalties on plaintiff-appellee Brentwood Academy ("Brentwood") as a result of asserted violations by Brentwood of the TSSAA's rule governing recruiting of student athletes. Brentwood sued the TSSAA and its

executive director, defendant-appellant Ronnie Carter, alleging violations of the *First* and *Fourteenth Amendments*, federal antitrust laws, and Tennessee law. After the United States Supreme Court determined that the TSSAA is a state actor, this court on remand held that the recruiting rule was content-neutral and subject to intermediate scrutiny. We remanded to the district court with instructions about the proper analysis in the case on the *First Amendment* issue. The district court conducted a ten-day nonjury trial. The district court found for Brentwood on the *First Amendment* issue, holding that the application of the rule to Brentwood was not narrowly tailored to further the TSSAA's legitimate, substantial interests. The district court also found for Brentwood on its substantive and procedural due process claims against the TSSAA, as well as on its procedural due process claim against Carter in his individual capacity. The district court enjoined the TSSAA's penalties against Brentwood. The district court also held that the TSSAA was entitled to immunity from Brentwood's antitrust claims. The parties cross-appealed to this court on these issues.

For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I.

A. Factual Overview

We begin with a description of the most pertinent facts and supply additional facts as necessary in our discussion of the various issues.

The TSSAA is a voluntary association of 290 public schools and 55 independent and parochial schools from across the state of Tennessee. The TSSAA is organized as a non-profit corporation under Tennessee law, with the purpose of stimulating and regulating interscholastic athletic competition among its member schools. Its governing entity is the Board of Control. As noted in the

Supreme Court's decision in this case, the Tennessee State Board of Education, beginning in 1925, explicitly acknowledged the TSSAA's functions "in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 292, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). In 1972, the Board designated the TSSAA as "the organization to supervise and regulate" interscholastic athletics and specifically approved the TSSAA's rules and regulations, including the recruiting rule. *Id.* In 1996, the Board dropped the rule expressly designating the TSSAA as regulator but did not change its relationship with the organization. *Id.* at 29293. At all times relevant to the present case, Ronnie Carter served as executive director of the TSSAA.

Brentwood Academy is an independent school in Brentwood, Tennessee, and a member of the TSSAA. In 1998, the school had about 520 students in grades six through twelve. Brentwood's athletic teams, especially its football team, have been very successful in interscholastic competitions, even though its enrollment is smaller than many of its competitors. At the time of the events in question, Brentwood's Headmaster was Bill Brown; the Athletic Director and Head Football Coach was Carlton Flatt; and the Director of Admissions was Nancy Brasher. Brentwood paid a fee to the TSSAA to renew its membership on an annual basis.

The TSSAA has promulgated a "recruiting rule" in order to regulate the attempts of secondary schools to recruit middle school student athletes for athletic programs. The rule, found in the TSSAA's Bylaws, reads:

> The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain

a student for athletic purposes shall be a violation of the recruiting rule.

The bylaws also include a number of questions and answers and other guidelines that are known as interpretive commentary. While these are meant to aid in the interpretation of the recruiting rule, they are not binding on the TSSAA Board of Control. Carter agreed that the recruiting rule itself is "all that really counts, everything else underneath it, the interpretative commentary is discretionary and it depends on the totality of the circumstances."

Excerpts from the interpretive commentary include the following:

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

. . .

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides [sic] used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

...

Private...schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

...

7. Admitting students to athletic contests free of charge when there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

The "definite feeder pattern" exception does not apply to Brentwood, except with regard to those students who are enrolled at Brentwood Academy itself in the sixth grade or higher.

In some form, the recruiting rule has been in effect at least since the early 1950s and probably earlier. It has undergone various changes; the auxiliary questions and answers and guidelines were added during the 1980s and 90s.

In 1997, a number of coaches at public high schools that were TSSAA members reported various alleged recruiting violations by Brentwood to the TSSAA. On behalf of the TSSAA, Carter and other TSSAA officials began an investigation into the allegations. During the investigation, Brentwood supplied Carter with a copy of a letter Flatt sent to various eighth grade boys in April 1997 as well as information regarding phone calls Flatt made to the families of the boys to whom the letter was sent. The letter read, in part:

> Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team.... Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage... We are certainly glad that you decided to become an *Eagle*.

The letter was signed, "Your Coach, Carlton Flatt." This letter was sent to all incoming ninth grade male students who had applied, been tested and admitted, and signed enrollment contracts with Brentwood.[1] Flatt testified that

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[1] Headmaster Brown later testified that those students who sign such contracts (and paid the accompanying $300 deposit), in his mind, were

after the letter was mailed, he received "a couple of phone calls" from parents of boys who received the letter with questions about the letter and the necessity of the boys attending practice. As a result of these calls, Flatt decided to call each of the families of the boys who received the letter to clarify that the spring practice was not mandatory and should not trump any other academic or athletic responsibility the boys might have. All twelve boys who received the letter ended up attending spring practice.

The TSSAA also investigated allegations that tickets for a Brentwood football game provided by Flatt to a middle school coach were used by some of the coach's student athletes to attend the game for free. As the TSSAA put it, these tickets were "made available to uncontrolled individuals" in a way that facilitated "the possibility for abuse." Flatt later testified that he had told the coach that the tickets were not to be used to provide free admission to middle school students. The middle school coach nonetheless allowed two of the free tickets to be used by two of his students.

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officially enrolled at Brentwood and committed to come. The TSSAA, however, contends that the term "enrolled" (as used in the recruiting rule) is defined in the TSSAA Bylaws, under Article II (Eligibility Rules), Section 1 (Academic Rules):

> To be eligible to participate in athletic contests during any semester... (b) Students shall be regularly enrolled, in regular attendance, and carrying at least five full courses. A student shall be considered as regularly enrolled after the student has attended for three days, has engaged in three or more days of football, girls volleyball, cross country, golf or girls soccer practice during the period on or after August 1, or has participated in an athletic contest in any sport.

There was some testimony at trial indicating that a few students every year do not end up attending Brentwood even after signing the enrollment contracts.

Carter notified Brentwood by letter dated July 29, 1997, that the TSSAA had found Brentwood guilty of multiple violations of TSSAA rules. The letter informed Brentwood of various penalties that would be assessed as a result of the rules violations. Brentwood requested a hearing with Carter and members of the TSSAA Board of Control; a hearing was held on August 13, 1997, at which Headmaster Brown and representatives of Brentwood made a presentation regarding the allegations and determinations in the July 29 letter. Following the hearing, Carter again sent a letter to Brown providing more specific information about the violations and penalties to be assessed against Brentwood. Pursuant to the TSSAA Bylaws, Brentwood appealed the penalties to the full Board of Control, which is charged with enforcing the TSSAA Bylaws. Another hearing was held on August 23, 1997. In an August 23, 1997, letter that represented the final TSSAA decision on the matter, the Board notified Brentwood that it had found that Brentwood, and specifically Flatt, violated the recruiting rule in two ways: (1) by granting free admission to a Brentwood football game to two eighth grade athletes from another school; and (2) by sending letters and making phone calls to eighth grade boys at other schools regarding spring football practice at Brentwood.[2] The Board also cited Brentwood for conducting impermissible off-season practice with certain Brentwood student-athletes, but this alleged rule violation is not an issue in this appeal. As a result of these violations, the Board imposed numerous penalties, including a four-year probation for Brentwood's entire athletic program, suspension of playoff eligibility for the

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[2] To be clear, the alleged violation of the recruiting rule was the *invitation* to attend football practice, not the practice itself. It is undisputed that in 1997, participation by incoming Brentwood students in spring football practice was permissible under TSSAA rules. The rule was subsequently changed to prohibit such participation.

Brentwood football and boys' basketball teams, and a $3,000 fine.

B. Procedural History

Brentwood sued the TSSAA and Carter (in his official and individual capacities) on December 12, 1997, alleging that the TSSAA violated the *First* and *Fourteenth Amendments*; the Sherman Act, 15 U.S.C. § § 12; and Tennessee law. On July 29, 1998, the district court found that the TSSAA and Carter were state actors and granted summary judgment to Brentwood on its *First Amendment* claim brought under 42 U.S.C. § 1983. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). The TSSAA appealed that decision, and the Sixth Circuit reversed, on the basis that the TSSAA is not a state actor and thus not subject to suit under § 1983. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999). The United States Supreme Court granted certiorari and reversed the Sixth Circuit, holding that "the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association." *Brentwood Acad.*, 531 U.S. at 291.

On remand from the Supreme Court, this court considered the merits of the TSSAA's appeal. This court reversed the decision of the district court granting summary judgment to Brentwood and remanded the case to the district court, holding that: (1) Brentwood did not waive its right to challenge the recruiting rule by voluntarily joining the TSSAA; (2) the recruiting rule is not facially overbroad; and (3) the district court erred by subjecting the recruiting rule to strict scrutiny, because it is content-neutral. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543 (6th Cir. 2001). This court remanded to the district court with instructions to: (1) determine whether the TSSAA's asserted substantial state interests for the

recruiting rule were legitimate; (2) determine whether the application of the rule to Brentwood was narrowly tailored to further the TSSAA's legitimate state interests; and (3) address Brentwood's claims against Carter in his official and individual capacities. *Id.* at 558.

After remand and prior to trial, on October 25, 2002, the district court granted partial summary judgment to defendants on Brentwood's antitrust claims, reasoning that since TSSAA is an organization "pervasively entwined" with the state, it is entitled to antitrust immunity under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

In December 2002, the district court held a bench trial and considered the issues addressed by this court in its 2001 opinion, as well as Brentwood's substantive due process, procedural due process, equal protection, and Tennessee state law claims. The court issued a memorandum opinion and order on January 13, 2003, finding: (1) for Brentwood on its *First Amendment*, substantive due process, and procedural due process claims against the TSSAA; (2) for Brentwood on its procedural due process claim against Carter in his individual capacity; and (3) for Carter with regard to Brentwood's *First Amendment* and substantive due process claims against Carter in his individual capacity. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F. Supp. 2d 981 (M.D. Tenn. 2003). The court held that Carter was not entitled to qualified immunity on Brentwood's procedural due process claim but that he would be entitled to qualified immunity on Brentwood's *First Amendment* claim. The court declined to reach the equal protection or state law claims, and it refused to award damages to Brentwood. As relief for Brentwood, the court enjoined the penalties imposed by the TSSAA against Brentwood in 1997.

On February 10, 2003, the TSSAA and Carter appealed the January 13, 2003, order to this court. On February 24,

2003, Brentwood cross-appealed, taking issue with: (1) the district court's October 2002 order granting partial summary judgment to defendants on the antitrust claims; and (2) the relief provisions of the January 13, 2003, order.[3]

II. ANALYSIS OF THE ISSUES

This court reviews a district court's findings of fact for clear error. *See Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989). However, conclusions of law, questions of mixed law and fact, and "findings of ultimate facts which result from the application of legal principles to subsidiary factual determinations" are all subject to *de novo* review. *Id.* (citation and quotation marks omitted); *see Cordrey v. Euckert*, 917 F.2d 1460, 1465 (6th Cir. 1990).

A. The TSSAA's Reliance on Its Contractual Relationship with Its Members

Permeating the TSSAA's arguments[4] on both the *First Amendment* and due process issues is its contention that rulings by the district court "ignored the constitutionally critical fact that the relationship between TSSAA and [Brentwood] arose entirely from a membership contract that [Brentwood] renewed each year." In other words, according to the TSSAA, "every argument of [Brentwood] and every ruling by the District Court relies [sic] on the false premise that TSSAA is the sovereign State exercising police power rather than a state actor that asks its members to honor its voluntary contractual obligations." Prior to undertaking analysis of the *First Amendment* claim, we must address this argument as it relates to that claim.

There is a short answer to the TSSAA's argument with regard to the *First Amendment* claim. The answer is that it

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[3] Brentwood did not appeal the district court's conclusions regarding Brentwood's equal protection or state law claims. Nor did it appeal the district court's dismissal of Brentwood's *First Amendment* and substantive due process claims against Carter in his individual capacity.

[4] For the sake of convenience and clarity, we refer to the defendants collectively as "TSSAA" throughout this section of the opinion.

is inconsistent with the law of the case and this court's 2001 opinion. In the 2001 opinion this court outlined the *First Amendment* analysis to be employed by the district court on remand. *See Brentwood Acad.*, 262 F.3d at 557-58. The underpinning of that analysis is that the TSSAA's role in this case is that of a governmental entity exercising regulatory authority and that the recruiting rule must be considered a content-neutral rule subject to intermediate scrutiny. The court noted with particularity that the recruiting rule was analogous to zoning ordinances and limitations on noise, posting of signs, and distribution of religious literature that have been upheld as reasonable time, place, and manner restrictions. *Id.* at 553-54. The panel in the 2001 decision instructed the district court on remand to determine whether the recruiting rule is narrowly tailored to meet TSSAA's substantial interests. *Id.* at 558. It noted that this question could not be decided in the abstract as a matter of law and contemplated that TSSAA would present evidence to justify the need for its regulations. *Id.* The panel was quite clear in outlining the district court's task on remand.

The TSSAA's reasoning invites us to stray from the 2001 panel's road map and follow another analytical route it deems more favorable to its position. In making its argument, it suggests that two lines of *First Amendment* cases — unconstitutional conditions cases represented by cases such as *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996), and government employee speech cases such as *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) — provide the correct analytical framework. Both lines of cases were mentioned by the panel in its 2001 opinion but in a context different from that in which the TSSAA now urges that they apply.

One argument made by the TSSAA in 2001, bearing substantial resemblance to its present position, was that

Brentwood "waived its right to question the constitutionality of the recruiting rule because, by voluntarily choosing to be a member of TSSAA, it has agreed to abide by the rules of the organization." *Brentwood Acad.*, 262 F.3d at 549. This court rejected that argument, reasoning that "the Supreme Court's rulings that parties do not give up *First Amendment* rights by contracting with, or being employed by, a public agency forecloses [sic] TSSAA's argument that Brentwood gave up its right to challenge the constitutionality of the recruiting rule because it voluntarily joined TSSAA." *Id.* at 550-51 (citing *Umbehr* and *Pickering*). While *Umbehr* and *Pickering* may have given guidance in disposing of the waiver argument, the 2001 opinion in no way indicates that they govern the analysis on remand as to whether the TSSAA's application of the recruiting rule to Brentwood violated its *First Amendment* rights.

Our agreement or disagreement with the 2001 panel decision is not at issue here. We have no authority to overturn a prior published decision of this court, *see Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001), and, moreover, that decision is the law of the case, *see Scott v. Churchill*, 377 F.3d 565, 569-70 (6th Cir. 2004). While courts have some discretion in following the law of the case doctrine, *see id.* at 570, this protracted and contentious litigation presents a compelling situation for its application. In order to maintain the integrity of the judicial process, an appellate court cannot change its mind as to the proper analysis after it has remanded a case for trial and the district court has tried it, giving its best effort to adhere faithfully to the appellate court instructions. We should properly review the district court's decision, but we cannot change the rules after the fact. *See United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) ("Determinations of the court of appeals of issues of law are binding on both the district court on remand and the court of

appeals upon subsequent appeal."). This stance properly defers to the precedent set by the prior panel and recognizes that the parties and the district court must be able to rely on this court's prior rulings in trying the case.[5]

While this court's 2001 ruling provides the definitive answer to the *First Amendment* argument based on the TSSAA's contractual relationship with its members, we note also that clear problems exist with the manner in which the TSSAA seeks to apply the "unconstitutional conditions" doctrine. The TSSAA relies on *Umbehr* to argue that the "unconstitutional conditions doctrine specifically allows a state agency to impose conditions, even on fundamental rights like free speech, when those conditions are reasonably necessary to accomplish the objectives of the contract." This is not an accurate reading of *Umbehr*, which held that the *First Amendment* limits the government's ability to terminate relationships with independent contractors because of their speech. *See* 518 U.S. at 673-74. Moreover, *Umbehr*, in which the Court addressed only the narrow issue of "whether, and to what extent, independent contractors [with the government] are protected by the *First Amendment*," *id.* at 673, is not a precisely apposite precedent anyway. *See also id.* at 685 (emphasizing the "limited nature of our decision today"). The present case does not involve the government as a party in a contractual relationship with an independent contractor, *cf. id.* at 678-79. Similarly, there are obvious differences between the

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[5] It is interesting to note that the TSSAA, in its first appeal to this court, challenged the "analytical framework that the district court used" in its initial decision. *Brentwood Acad.*, 262 F.3d at 551. We agreed with the TSSAA the last time around, holding that "the district court erred in concluding that the recruiting rule is a content-based regulation that fails strict scrutiny review" and that, rather, the recruiting rule is content-neutral and subject to intermediate scrutiny. *Id.* at 551-53. In this appeal, however, we cannot agree with the TSSAA's challenge to the analytical framework governing the case and set out by this court previously.

TSSAA's role in this case and the government's role as employer, *cf. Pickering*, 391 U.S. at 574. The TSSAA's reliance on the argument that Brentwood's speech is not a matter of public concern is thus misplaced. The requirement that speech relate to a matter of public concern in order to be protected emanates from the government employee cases in which employee speech is limited in many respects by virtue of the employer-employee relationship. *See id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). The public concern requirement is not a part of the intermediate scrutiny given to a content-neutral restriction on speech. The 2001 decision of this court, in discussing the waiver issue, described the way in which public interests were to be taken into account on remand. In that decision, this court observed that substantial government interests, which the TSSAA would have to establish, were of necessity matters of public concern. *Brentwood Acad.*, 262 F.3d at 551. In making this observation, it placed the public interests concept in its proper place in the framework adopted later in the opinion — on the governmental interest in promulgating the rule, not on the question of whether Brentwood's speech related to a matter of public concern. *See id.* at 557-58.

A couple of nuances in the TSSAA's argument deserve mention. The TSSAA urges the applicability of its preferred analysis by differentiating between the government's "sovereign power" and its "contractual power." In doing so, it makes much of the dicta in *Umbehr* discussing the difference between the government's "sovereign power" and its "contractual power." See 518 U.S. at 678. Reading *Umbehr* too broadly, it asserts that *Umbehr* extended the *Pickering* "public concern" framework to "any case where the government is exercising contractual power as opposed

to sovereign power." Again, the applicability of the *First Amendment* to the TSSAA's regulatory conduct does not hinge on whether there was a contract or not. Even if such a distinction between contractual and sovereign power were applicable in any meaningful way to the present case, the Court's conclusion in *Umbehr* — that some scrutiny more deferential than strict scrutiny should apply — when the government exercises contractual power — does not suggest that the *First Amendment* does not apply to the TSSAA's enforcement of its recruiting rule. *See id.* In fact, *Umbehr* suggests that the approach this court took in its previous opinion was the right one: that the *First Amendment* does apply to the rule, and intermediate scrutiny is the standard to which the rule should be subjected. *See Brentwood Acad.*, 262 F.3d at 551-54; see also *Umbehr*, 518 U.S. at 678 ("The tests that we have established in our government employment cases must be judicially administered with sensitivity to governmental needs, but *First Amendment* rights must not be neglected.").

A second nuance relates to the TSSAA's efforts to cast the present case as a "subsidy" case, where the government has considerable autonomy over how a government program is administered. This characterization is similarly futile. The defendants state in their brief that "TSSAA membership is a subsidy" and that under *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the government acting as a contractor in a subsidy context "must be able to require the contracting party to limit its speech when reasonably necessary to effectuate the purposes of the contract." Tellingly, the defendants cite to no page in the *Rust* opinion that supports this reading of the case; there is none. *Rust* involved a government funding program involving disbursements to doctors to advise patients on family planning topics. One condition of the program was that no funds could be used in programs where

abortion was presented as a method of family planning. The Court upheld the program, reasoning that Congress had "merely chosen to fund one activity to the exclusion of the other." *Id.* at 193. In later *First Amendment* jurisprudence, the Court "explained *Rust* on the understanding" that the government in that case was itself engaging in speech and could thus make viewpoint-based funding decisions. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001); *see also United States v. Am. Library Ass'n*, 539 U.S. 194, 211-12, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) (plurality opinion) (citing *Rust* in upholding the government's requirement that libraries receiving federal subsidies utilize filtering software). Clearly, the TSSAA's enforcement of the recruiting rule is not a funding program. Nor does it represent government speech. Cases like *Rust* do not govern the present case.

Thus, as the 2001 panel determined, the appropriate characterization of the TSSAA's role is as a government regulator, a context to which the *First Amendment* surely applies. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834-35, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 13031, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992); *see also Brentwood Acad.*, 531 U.S. at 291 (holding that the association's "*regulatory* activity" is state action, even though "no school is forced to join" the TSSAA) (emphasis added); *id.* at 292-93 (noting that the Tennessee State Board of Education designated the TSSAA as "the organization to supervise and *regulate* [interscholastic] athletic activities" in Tennessee, and that the present case was triggered by a "*regulatory* enforcement proceeding") (emphasis added). The applicability of the *First Amendment* to regulation of speech by the government in this context does not vary depending on whether the speech relates to a matter of public concern or whether the relationship between the government and the speaker is voluntary or contractual.

For example, when the government regulates how and when citizens can enter into voluntary contractual relationships with the government that regulate certain speech by those citizens, the government's licensing or regulatory scheme must meet constitutional standards, regardless of whether the speech at issue involves a matter of public concern. *See Forsyth County*, 505 U.S. at 129-31; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-53, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). The same goes for the TSSAA's application of its recruiting rule.

We thus reject the defendants' attempt to reshape the framework through which we view this case — a framework set out by this court previously and utilized by the district court in trying the case. The TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds. Therefore, as this court has previously concluded, Brentwood's *First Amendment* rights are at issue in this case, and intermediate scrutiny applies to the TSSAA's application and enforcement of the recruiting rule.

The dissenting opinion accepts the TSSAA's invitation to revisit previously rejected arguments and to re-characterize them as new ones. In fact, it even goes beyond the TSSAA's arguments and suggests that no *First Amendment* rights are implicated here.

The opening sentences of the dissenting opinion are conceptually attractive when first read. They are: "High school football is a game. Games have rules." Of course, games have rules. And so do cases. Here, the rule is called "law of the case." The dissent correctly notes that this dispute hardly evokes our notions of the core values of the *First Amendment*; the same could doubtless be said of other examples of *First Amendment* jurisprudence. But, in this case, the time for appellate court observation of any lack of a *First Amendment* issue was long ago.

In recycling the TSSAA's waiver argument, the dissent characterizes the 2001 panel decision as dealing with a broad issue of whether Brentwood had waived its right to sue entirely. The problem with this interpretation is that in 2001 Brentwood *had* sued and *had* challenged the same rule at issue in this appeal. The panel was discussing waiver in this context, and the clear import of its decision is that Brentwood had not waived or given up its right to challenge the rule at issue here by entering into a contract with the TSSAA.

Another difficulty with the dissent's waiver theory is that it is implicitly based on the content of the contract. Yet the contract here contains no provision that assists in the analysis. Brentwood does agree to be bound by the rules. If the TSSAA were not a state actor, that would be the end of the story. Since the TSSAA *is* a state actor, the contract gives no guidance as to whether Brentwood waived a right to challenge a rule it considered unconstitutional. The contract's silence thus becomes evidence of an absence of waiver of constitutional rights. The silence provides no basis for differentiating between a waiver of some rights and not others.

B. Application of the Recruiting Rule to Brentwood

Turning to the analysis of the *First Amendment* issue, we consider whether the TSSAA's application of the recruiting rule to Brentwood violates the *First Amendment.* In the 2001 opinion, the court laid out the intermediate scrutiny analysis that applies to content-neutral regulations:

> A regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less

> effectively absent the regulation . . . . The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

Brentwood Acad., 262 F.3d at 557 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (internal quotations, citations, footnotes, and alterations omitted)). The TSSAA has asserted three interests as justification for the recruiting rule: (1) to keep high school athletics in their proper place subordinate to academics; (2) to protect student athletes from exploitation; and (3) to foster a level playing field among the various member schools. *See id.* In its previous opinion, this court recognized the first interest as legitimate and substantial. *See id.* at 557-58 (citing *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 386-87 (6th Cir. 1992)). This court remanded to the district court to determine whether the TSSAA's other two asserted substantial state interests for the recruiting rule were legitimate. *Id.* at 558.

The district court held that the TSSAA has a substantial governmental interest in protecting student athletes from exploitation. While it also held that the TSSAA's interest in fostering a "level playing field" was a legitimate governmental interest, it found that this interest was not substantial, especially considering that "the substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests." Unlike rational basis review, intermediate scrutiny does not allow a court to supplant the particular interests put forward by the state with other suppositions. *See Edenfield v. Fane*, 507 U.S. 761, 768, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993). In determining

whether an interest is substantial, a court must look beyond "hypothesized justifications," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373-74, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002), and focus instead on the "actual interests served by the restriction." *Edenfield*, 507 U.S. at 768.[6]

The district court's conclusions regarding the TSSAA's interests, which we review *de novo*, were not erroneous. With regard to the asserted interest of protecting student athletes against exploitation, the TSSAA presented voluminous evidence at trial, primarily via expert witness testimony, in support of its argument that this interest is a substantial one. Carter testified that the "fundamental" reason for the recruiting rule was preventing exploitation. One of Brentwood's expert witnesses even testified that preventing the exploitation of student athletes, defined as the "selfish, unjust utilization of students for a school's benefit rather than for the benefit of the individual student," was a compelling state interest. At one point in its brief, Brentwood seems to suggest that evidence such as written legislative history or testimony from the initial drafters of the recruiting rule is necessary to prove that preventing exploitation of students was one of TSSAA's "actual" interests in applying the rule to Brentwood.[7] For the

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[6] *Edenfield* and *Thompson* are commercial speech cases, but the test they apply, just like the test applicable here, asks the court to determine whether the asserted state interests are substantial. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

[7] Mostly, however, Brentwood conflates the "substantial interest" prong of the intermediate scrutiny test with the "narrowly tailored" prong, conceding later in its brief that the "TSSAA has a substantial interest in preventing exploitation of students," defined as "a student...being threatened, coerced, or harassed." Brentwood's argument that there are "problems with this theory...as a justification for TSSAA's disciplinary action" against Brentwood is evaluated in the next section of this opinion, since this is an argument that the application of the rule was not "narrowly tailored" to further Brentwood's legitimate and substantial interests.

purposes of the first prong of the intermediate scrutiny test, it is only necessary to establish that the actual interest exists and is substantial, and this can be done without resort to such primary sources. While there is no known written legislative history for the recruiting rule and all of the initial drafters of the rule are dead, the evidence, especially Carter's testimony under oath, suggests that preventing the exploitation of middle school student athletes is a substantial state interest and was one of the TSSAA's "actual" interests in applying the rule to Brentwood. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 312, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (Souter, J., concurring in part and dissenting in part) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (plurality opinion)) (noting that the state can regulate speech to further an interest in preventing reasonably "anticipated harm," as long as the harm is real); *see also* Knight Foundation Commission on Intercollegiate Athletics, *A Call to Action: Reconnecting College Sports and Higher Education* 20-21 (2001) (noting that "high school sports today can reflect the worst of their collegiate counterparts" in terms of exploitative commercial influences, pervasive recruiting efforts, and academic compromises for student athletes focused only on a professional athletic career); *cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978) (holding that the state has an important interest in preventing solicitation by lawyers that involves undue influence, intimidation, overreaching, and other forms of "vexatious conduct").

The TSSAA also introduced evidence that supports its contention that fostering a level playing field among member schools is a legitimate state interest. Specifically, its experts and Brentwood's own Headmaster Brown testified that the recruiting prohibition helps level the playing field among schools, especially as between private schools with significant resources and public schools with

more limited resources and access to potential students. Carter testified at length about *how* the recruiting rule preserves competitive equity among schools, explaining that without the rule, "the rich would get rich real quick, and the poor would get poor real quick." There is very little, if any, evidence, however, explaining *why* competitive equity is an important value in the first place. It may be true, as defendants claim in their brief, that "maintenance of fair competition among [the TSSAA's] members lies at the core of [the TSSAA's] reason for being," but simply saying this is so does nothing to demonstrate why such a "reason for being" is a substantial state interest. State actors may act out of a variety of interests, but only some are substantial. The defendants can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest, especially when coupled with the admittedly substantial interest of ensuring that athletics do not become more important than academics at the high school level. The district court was right that this interest, while legitimate, is not substantial.[8]

Having established that the TSSAA has substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes, the next question in the analysis, as set out in this court's previous opinion on the matter, is whether the recruiting rule, "as applied to Brentwood," is narrowly tailored to further those interests. *See Brentwood Acad.*, 262 F.3d at 557; *see also*

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[8] Despite our conclusion that the district court correctly found that the TSSAA had established substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes, the dissent devotes considerable attention to a discussion of the type of proof a defendant might have to present to support such interests. The two opinions do not differ on the ultimate point, that is, the TSSAA did have substantial state interests at stake. The true point of departure is whether the rule "as applied to Brentwood" is narrowly tailored to further those interests. *See Brentwood Academy*, 262 F.3d at 557.

Turner Broad. Sys., 512 U.S. at 664 (plurality opinion) ("That the Government's asserted interests are important in the abstract does not mean...that the [speech regulation] will in fact advance those interests."). Specifically, the district court's task was

> to decide if the punishment exacted for these alleged violations relating to the free game tickets, spring football-practice letters, and the follow-up telephone calls was appropriate regulatory action narrowly tailored to further TSSAA's legitimate interests as a state actor....In proceeding with this case on remand, we caution both the parties and the district court to stay focused on the two alleged recruiting rule violations in question, rather than engage in a wide-ranging attack or defense of the recruiting rule as a whole.[9]

Brentwood Acad., 262 F.3d at 558. This court also noted in its previous opinion that the application of the recruiting rule must not "'unreasonably limit alternative avenues of communication.'" *Id.* at 554 (quoting *City of Renton v.*

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[9] The "two alleged recruiting rule violations" referred to here are: (1) the free game tickets and (2) the spring practice letters and follow-up calls. *See Brentwood Acad.*, 262 F.3d at 548. While this court's previous opinion considered both of these rule violations as bases for Brentwood's *First Amendment* claim, neither the initial district court opinion nor the opinion being appealed here applied *First Amendment* scrutiny to the application of the recruiting rule to the free game tickets episode. In both opinions, the district court considered only whether the application of the rule to the letters and phone calls was constitutional. Defendants state in their brief that "only the spring practice letters and phone calls formed the basis of [Brentwood]'s *First Amendment* claim."

The disconnect between this court's previous opinion and the district court's opinions on this point is likely due to the fact that, judging from its brief, Brentwood has focused its *First Amendment* claim on the punishment for the letters and calls, recognizing, perhaps, that it is unclear whether the *First Amendment* is implicated by the provision of free game tickets. Regardless, we confine our "narrowly tailored" inquiry to the letters and calls, leaving the free tickets episode to be considered under substantive due process analysis.

Playtime Theatres, Inc., 475 U.S. 41, 47, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)). On remand, the district court held that the recruiting rule "is not narrowly tailored to further any of the three governmental interests of the TSSAA as applied to Brentwood Academy."[10]

Reviewing *de novo*, we affirm this conclusion. The defendants import a definition of "enrolled" from a separate provision in the TSSAA Bylaws to support their argument that the students contacted by the letters and calls were not truly enrolled at Brentwood and that Brentwood therefore violated the recruiting rule by contacting them. Putting aside the fact that the Bylaw provision upon which defendants rely seems to apply not to practices or recruiting but rather only to eligibility to participate in athletic contests, the defendants' contention that the students at issue were not enrolled misses the point. Considering that the interpretive commentary to the recruiting rule is not binding and serves only as a guideline, the TSSAA's use of its discretion to punish Brentwood for the letters and calls was not a narrowly tailored way to keep athletics subordinate to academics at Brentwood or ensure that the student athletes being contacted were not being exploited.[11]

First, surely, however one defines "exploitation," this interest was not furthered by punishing Brentwood. As the district court pointed out, the students contacted by the letter and calls had already signed enrollment contracts with Brentwood Academy, and the letter and calls were

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[10] Even though the district court found that fostering a level playing field was not a substantial state interest, it nonetheless included the interest in its "narrowly tailored" analysis.

[11] It is worth noting again that the district court's task was to consider the application of the recruiting rule specifically to Brentwood on these facts. The district court's opinion does not mean that application of the recruiting rule to other schools communicating in similar ways to students would be unconstitutional. For example, it is possible that letters and calls similar to the ones at issue here would be exploitative in a different context.

directed to all male students who had done so. In fact, Brentwood did not send the letter to one male student who had been accepted by Brentwood but had not yet signed an enrollment contract. Indeed, the students contacted had all agreed, and by all accounts were excited, to attend Brentwood the following year. Additionally, it is clear that the follow-up phone calls were made to clarify for the students involved that the practice was optional and should not preclude any other commitments they might have. The district court was right that "neither students nor parents were exploited in theory or in fact."

With regard to the former interest (keeping athletics subordinate to academics), it is a closer call, but the TSSAA's use of the regulation to punish Brentwood seems to "burden substantially more speech than is necessary to further the government's legitimate interest" in keeping athletics subordinate to academics. *See Ward*, 491 U.S. at 799; *see also United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (holding that content-neutral regulations will be sustained only "if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest"). The TSSAA must demonstrate that in this situation "the recited harms [were] real, not merely conjectural, and that the regulation [would have] in fact alleviated these harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664. They did not demonstrate this at trial. The district court obviously found the testimony of the parents of the boys in question to be more significant and persuasive than evidence from experts indicating that the letters and calls might — in theory — signal an emphasis on athletics over academics. The parents indicated they were glad to get the letter, and they did not at all think the implication of the letter was that Brentwood subordinated athletics to academics.

If the letters and calls were the first or only pieces of information the students or their families had ever received about Brentwood or would receive before arriving at the school, then an argument could be made that the school was unduly emphasizing athletics over academics. This was not the case. Each of the families of the children in question had already signed enrollment contracts with Brentwood. The information about spring football practice was simply information being provided to incoming students about an extracurricular activity available to them — an activity in which incoming students were allowed to participate under TSSAA rules.[12] Incoming students at Brentwood received a variety of information about a multitude of topics and activities, including academics at the school, and the letters and calls should be seen in this context.[13]

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[12] That the rule was subsequently changed to prevent such participation in spring practice bolsters the conclusion that the TSSAA's punishment of Brentwood in this case was not narrowly tailored. Banning spring practice participation, rather than applying the recruiting rule punitively to Brentwood's invitation to participate in the approved activity, would have been a more narrowly tailored way to promote the TSSAA's substantial interests. *See Thompson*, 535 U.S. at 373 ("Regulating speech must be a last — not first — resort. Yet here it seems to have been the first strategy the Government thought to try.").

[13] Headmaster Brown testified:

> As far as enrollment, we had to deal with our kids to get them acclimated to the school before they came. It would be — there's no way that they could start with no contact from the school before. I mean that's part of what all schools do. I mean they have got to get reading lists, got to know about the picnics, got to know about the options in the summer retreat, work options, and all of that so we have to communicate with them.

Admissions Director Brasher noted that admission is generally granted in November or February of the previous school year, and after a student is admitted and signs the enrollment contract, the student receives a packet of information, including a letter from the admission director, the student-parent agreement, and the handbook for Brentwood Academy with policies and procedures. Also, once an enrollment contract is signed,

Even if the students could (and sometimes did) "wiggle out" of their contracts with Brentwood, this did not mean that Brentwood should be punished for disseminating information about an optional activity for incoming Brentwood students. In fact, defendants' argument that the students in question were not technically enrolled and could have still decided to attend another school might even weigh in Brentwood's favor, in that the letters and calls could be seen as part of an ongoing attempt to make sure the incoming students were informed about what Brentwood had to offer. That these particular communications emphasized athletics does not mean that punishing Brentwood for the communications served the TSSAA's interest in keeping athletics subordinate to academics. In this context, the harm the TSSAA sought to prevent was "conjectural," not "real," or at least not based on the evidence in the record. *See id.* Put another way, it is not clear that the TSSAA's substantial interest in subordinating athletics to academics was achieved any more effectively by punishing Brentwood for Flatt's letters and calls than it would have been had no punishment been handed down. *Cf. Ward*, 491 U.S. at 798-801, 800 n.7 (holding that a sound-amplification guideline that eliminated the evils the city sought to eradicate without restricting a substantial

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that student's family is put on the school's general mailing list, and they receive all the information that is sent to current students. Brasher provided more details:

> We have a mailing that goes out usually about the end of May that will include reading list, letters from the English teachers, information about our summer session which includes summer school, computer camps, drama camps, athletic camp, driver's ed. We have arts in April, it's a big fine arts venue in April and we send them information on that.

Brasher also noted that there are some mailings that are targeted to particular groups of students, such as a letter about cheerleading tryouts that is sent only to girls.

quantity of speech represented "the essence of narrow tailoring," because it was not "substantially broader than necessary to achieve the interests justifying it"); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (upholding a time/place/manner regulation because it "responded precisely to the substantive.

To justify its regulation on Brentwood's speech, the TSSAA cannot rely on "shoddy data or reasoning"; rather, its evidence must "fairly support [its] rationale" for the application of the recruiting rule to the letters and calls. *See City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). Carter himself seemed to doubt that one could actually measure whether such letters and calls would emphasize athletics over academics or exploit the children:

> Well, I think, first of all, you can't measure — you can't measure it on the effect that it had on those kids or any other circumstance that would occur. If [exploitation] occurs, then it's very difficult to imagine what impact it has on or to figure out what impact — I very seldom have seen kids in those situations that think it's had any impact on them. But it's very hard to turn around and determine that.

Carter's instinct was accurate, since despite evidence by numerous parents, school officials, and experts at trial, there was no evidence to show that the punishment of Brentwood was justified due to the effect of Brentwood's actions on the children or the relative standing of academics and athletics at the school. In sum, the TSSAA did not show that the application of the recruiting rule to Brentwood was narrowly tailored to serve the TSSAA's substantial

interests.[14] Reviewing *de novo*, we affirm the holding by the district court on this issue.[15]

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[14] This court's previous opinion supports this conclusion. In determining that the recruiting rule is content-neutral, rather than content-based, this court pointed out that the recruiting rule does not impose a "total ban...on communications between secondary schools and middle school athletes regarding high school athletics." *Brentwood Acad.*, 262 F.3d at 551-52. According to the court's opinion, the greatest restriction imposed by the rule is the "prohibition on coaches...from initiating contact with middle school students *for the purpose of recruiting student athletes.*" *Id.* at 552 (emphasis added). The rule allows "numerous ways in which Brentwood can get its message about athletics out to prospective students," as evidenced by the letter written by Brentwood's lawyer to the TSSAA in 1993 detailing Brentwood's understanding of various acceptable modes of communication. *Id.* On remand, the district court determined that applying the rule to the letters and calls was unconstitutional, since the application of the rule to the letters and calls was not narrowly tailored to further the TSSAA's substantial interests. Under the terms of this court's previous opinion, one could also read the district court opinion as a suggestion that the communications either were not made for the purpose of recruiting student athletes, or fell under the category of acceptable modes of communication under the recruiting rule, or both.

[15] The dissenting opinion's approach to this aspect of the case departs from a record-based analysis of whether the application of the recruiting rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests. In doing so, it neglects consideration of the evidentiary record, a process that an as-applied challenge necessarily entails, and substitutes theoretical analogies between recruiting rules and restrictions on adult-oriented businesses. While the dissent's approach might be appropriate in cases involving facial challenges to a regulation, such as *Renton* and *Ward*, on which the dissent heavily relies, it is inconsistent with the proper analysis for an as-applied challenge. *See Taxpayers for Vincent*, 466 U.S. at 796, 803 (distinguishing between a facial challenge and an as-applied challenge and concluding, after determining that the appellee could not establish that the law is "unconstitutional in every conceivable application, or...seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad,'" that the challenge was "basically a challenge to the ordinance as applied to [the appellee's] activities," and therefore "limited [the Court's] analysis of the constitutionality of the ordinance to the concrete case before [it]"); *cf. Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (noting that litigants bring a facial challenge where they attack "a statute not because their own rights of

C. Free Tickets as a Substantive Due Process Violation

The district court also held that the application of the recruiting rule to Brentwood violated the school's substantive due process rights with regard to the free tickets used by two students to attend a Brentwood football game. After citing authority indicating that the doctrine of substantive due process means that "governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed," *see Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (internal quotation marks and citation omitted), the district court centered its substantive due process analysis on the notion that

> as applied, the Recruiting Rule did not give Brentwood Academy constitutionally adequate notice that providing tickets to another coach, who secretly disregards express instructions to use the tickets only for adults, will constitute a violation.

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free expression are violated, but because...the statute's very existence may cause others not before the court to refrain from constitutionally protected speech").

The dissenting opinion's only arguable reference to the trial court record on the issue of whether application of the rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests is its suggestion that the rule permitted Brentwood to distribute its letters to private athletic leagues and other schools and permitted Brentwood coaching staff to refer potential students who contacted them to other Brentwood officials. The dissent deems these options alternative channels for communication. While these options are presumably permissible (but not mentioned in the evidence), they are hardly viable alternatives for achieving Brentwood's purpose and communicating the information contained in the letters to incoming students. The dissent's noting of these options is another way of saying that the recruiting rule did not prohibit Brentwood from advertising its sports and other offerings to the world at large through any available public medium, but that fact has little if anything to do with whether the recruiting rule as applied to Brentwood was narrowly tailored to serve the TSSAA's substantial interests.

> The Recruiting Rule is unconstitutionally vague as applied to Brentwood Academy on the facts of this case.

The court went on to explain that "the Recruiting Rule did not give...Brentwood Academy a reasonable opportunity to know what was prohibited with regard to complimentary tickets so that it could act accordingly."

When the vagueness argument was formulated as a *First Amendment* challenge, this court repudiated it. *See Brentwood Acad.*, 262 F.3d at 557 ("As a whole, the [recruiting] rule gives reasonable notice of what is prohibited, especially as applied to Brentwood."). Essentially, the district court has now recast its previous holding striking down the recruiting rule as overbroad and vague (a holding that was reversed) as a determination that Brentwood's substantive due process rights were violated. *See Brentwood Acad.*, 13 F. Supp. 2d at 693. Yet, if the substantive due process claim is characterized as a vagueness challenge,[16] then for the reasons set out in this court's previous opinion, the claim fails. *See Brentwood Acad.*, 262 F.3d at 555-57; *see also Grayned v. City of Rockford*, 408 U.S. 104, 112, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (upholding an anti-noise ordinance against a vagueness challenge because it clearly "delineates its reach in words of common understanding") (internal quotation

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[16] Brentwood's initial complaint lumps together a number of justifications for its claim that TSSAA violated its substantive due process rights. For instance, Brentwood claims that the recruiting rule infringed on liberty interests of students and parents to choose their schools, the recruiting rule is too vague, and the rule is fundamentally unfair in that Brentwood was punished for actions of a person beyond its control. The third argument is better analyzed as a procedural due process claim and is considered *infra*. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (holding that substantive due process precludes certain government actions "regardless of the fairness of the procedures used to implement them") (citation omitted).

marks and citation omitted). If the substantive due process claim instead rests on an argument that the TSSAA's application of the recruiting rule infringed some fundamental constitutional right, the claim fails because no such right is implicated here,[17] and the TSSAA's action was thus subject only to rational basis scrutiny. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955). Lastly, if the substantive due process claim rests, as the district court seems to intimate at one point, on an allegation that the TSSAA acted arbitrarily or capriciously to deprive Brentwood of a property or liberty interest, it still fails, at least as a *substantive* due process claim. Brentwood could not reasonably allege that the defendants perpetrated an "egregious abuse of governmental power" sufficient to give rise to a substantive due process claim, because there is no evidence to suggest that the defendants "maliciously and intentionally abused [their] state authority in order to injure" Brentwood. *See Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 201 (6th Cir. 1987). Indeed, such a claim of a deprivation of a property or liberty interest, at least outside of the zoning context, *see Pearson*, 961 F.2d at 1217, is more appropriately characterized as a procedural due process claim, which is considered *infra*. For all of these reasons, the district court erred in concluding that the application of the recruiting rule to penalize Brentwood for the free game tickets episode violated Brentwood's substantive due process rights. We reverse the district court on this issue.

D. Procedural Due Process Claim

The district court also found that Brentwood's procedural due process rights were violated. The *Fourteenth Amendment* provides, in part, that "no State

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[17] The fundamental right to educate one's own children, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510, 53435, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), is not at issue, especially since the regulation and penalties were applied only against Brentwood, not against the parents of the children involved.

shall . . . deprive any person of life, liberty, or property, without due process of law." *U.S. Const. amend. XIV*, § 1. Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest. *See, e.g., Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) ("Courts have long recognized that the *Fourteenth Amendment* requires that an individual who is deprived of an interest in liberty or property be given notice and a hearing."). Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process. *Hamilton v. Myers*, 281 F.3d 520, 529 (6th Cir. 2002).

The first issue is whether Brentwood was deprived of a property interest. Clearly, at a minimum, fining Brentwood $3,000 deprived Brentwood of a property interest. *See Herrada v. City of Detroit*, 275 F.3d 553, 556 (6th Cir. 2001). The panel need not decide whether potential lost revenues due to the ban from playoff participation also qualify as a property interest.

The second step in the procedural due process analysis is determining whether the TSSAA's deprivation of Brentwood's property interest contravened notions of due process. Under circuit precedent, a *§ 1983* plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either: (1) an "established state procedure that itself violates due process rights," or (2) a "random and unauthorized act" causing a loss for which available state remedies would not adequately compensate the plaintiff. *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991). A plaintiff alleging the first element of this test would not need to demonstrate the inadequacy of state remedies. *Moore v. Bd. of Educ. of Johnson City Sch.*,

134 F.3d 781, 785 (6th Cir. 1998). If the plaintiff pursues the second line of argument, he must navigate the rule of *Parratt v. Taylor*, 451 U.S. 527, 539, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), which holds that a state may satisfy procedural due process with only an adequate post-deprivation procedure when the state action was "random and unauthorized." *See Macene*, 951 F.2d at 706. In *Zinermon v. Burch*, 494 U.S. 113, 12829, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), the Supreme Court narrowed the *Parratt* rule to apply only to those situations where pre-deprivation process would have been impossible or impractical. In this context, an "unauthorized" state action means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law. *See id.* at 138.

Whether seen as an attack on an established state procedure or as an attack on a "random and unauthorized" act, Brentwood's claim is not subject to the *Parratt* rule, as it clearly was not "impossible" for the TSSAA to grant a pre-deprivation hearing[18] to Brentwood on these facts. *See id.* at 128. It seems clear that Carter and the Board had the

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[18] The district court stated that Brentwood was deprived of its property interests immediately upon issuance of the July 29, 1997, letter, simply because the letter itself said the penalties were effective immediately. *See Brentwood Acad.*, 304 F. Supp. 2d at 1005. The hearings held after this date, the court reasoned, were therefore post-deprivation hearings, which under certain Supreme Court precedent, must be more extensive and thorough than pre-deprivation hearings. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). This conclusion by the district court seems wrong, as Brentwood did not pay the $3,000 fine, and it appealed the July 29, 1997, decision precisely so it would not have to pay the fine or be subject to any other penalty. Brentwood had thus not been "deprived" of its property by August 23, when the final hearing was held. *Cf. id.* at 545-46 (drawing the deprivation line at the moment of termination of employment). In any event, it is immaterial to the analysis in this case whether the hearing process occurred pre-deprivation or post-deprivation.

authority to impose the penalties against Brentwood; their acts were not "random and unauthorized." If, as is more likely, the TSSAA's action was the result of an "established state procedure," then the question becomes whether that procedure violated Brentwood's due process rights.[19]

Brentwood first argues that it was deprived of the right to a "neutral, impartial decision-maker." Brentwood points out that Carter acted as investigator, trial judge, initial appellate judge, and participant in the final appeal. This court, however, has rejected arguments that due process is violated when the same official plays multiple roles in the process, such as when he acts as investigator, witness, presiding officer at hearing, and final decision-maker. *See Moore*, 134 F.3d at 786; *Duchesne v. Williams*, 849 F.2d 1004, 1005 (6th Cir. 1988) (en banc); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 926-27 (6th Cir. 1988). This line of argument thus fails.

In finding a violation of Brentwood's procedural due process rights, the district court focused on Brentwood's alternative procedural due process argument: that during the TSSAA Board of Control's private deliberations after the August 23, 1997, hearing, the Board heard *ex parte* evidence regarding contacts with middle school students allegedly made on behalf of Brentwood, and that this evidence affected the Board's final decision and penalty. Brentwood claims that it should have had the chance to rebut this evidence by cross-examining the TSSAA investigators who discussed these contacts with the Board during the private deliberations. *See Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to

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[19] Even if the acts were "random and unauthorized," and the *Parratt* rule did apply, the ultimate issue would be this same question: whether the procedure provided (the hearings in front of the Board of Control) was adequate. *See Macene*, 951 F.2d at 706.

confront and cross-examine adverse witnesses."); *see also Loudermill*, 470 U.S. at 546 ("The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.").

In evaluating Brentwood's argument, it is necessary to recount in some detail the evidence about the subject of the *ex parte* discussion. There had been reports made to the TSSAA alleging that an Amateur Athletic Union (AAU) basketball coach named Bart King urged particular middle school student athletes to attend Brentwood, had provided transportation to Brentwood for those students, and promised scholarships to those students. Brentwood alleged in its initial complaint that King was in no way affiliated with the school and that Brentwood never represented to King or others that King had authority to act on its behalf. After the TSSAA received reports containing the allegations involving King, two TSSAA officials, Gene Meness and Bernard Childress, investigated the matter. Meness and Childress met with Brentwood Headmaster Brown in early June 1997 and asked Brown about King. Brown suggested that they put questions regarding King and other issues in writing and send them to him. Through an exchange of letters during July 1997, the TSSAA informed Brentwood that it was investigating the allegations relating to King, and Brentwood stressed to the TSSAA that King was in no way associated with Brentwood Academy. Meness and Childress did not speak to King during the investigation.

As the district court found, there was no indication from the TSSAA before the final hearing that it was still considering the Bart King allegation.[20] In fact, the district

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[20] Carter's July 29, 1997, letter to Brown details six "concerns" and violations on which the penalties are based. Only the sixth concern, which obliquely refers to contacts "by persons not connected with Brentwood Academy," arguably has anything to do with King. The violation listed

court determined that "the TSSAA and Carter misled Brentwood Academy about a person and allegation which ultimately mattered to the decision." *See Brentwood Acad.*, 304 F. Supp. 2d at 1004 n.29. Despite this lack of indication that King's conduct was at issue, at the final hearing on August 23, Brentwood's counsel Tom Nebel offered to call King as a witness, saying, "We have Bart King here to answer any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear Bart King or not. He's here if you want him." Carter answered, "No." Evidently this was the only discussion of King at the hearing. Carter later testified that "if Brentwood Academy wanted [to call King], they could have easily done it....The school can put on anything they want to." Nebel later testified that he was not cut off from presenting any information he wanted to present at the hearing.

Meness and Childress were present during the Board of Control's private deliberations following the August 23 hearing. While Childress recalled answering some questions posed by Board members, neither Meness nor Carter recalled answering any questions about Bart King. Board of Control President Mike Reed and Board member Michael Hammond testified that during the Board's private session, the Board discussed the allegations surrounding King's actions. In Reed's initial deposition in this case, Reed was asked whether the King allegations were one of the reasons behind the Board's ultimate finding (upon which the penalties were based, in part) that there was "contact with

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under concern six, however, gives no indication that the TSSAA seeks to assign any responsibility to Brentwood for any actions by King. At the first hearing on August 13, 1997, Brentwood submitted an affidavit from King denying the allegations detailed in the earlier exchange of correspondence between the TSSAA and Brentwood. Then, after the first hearing, Carter sent Brown a letter dated August 14, 1997, listing the violations found at the first hearing. None of these violations implicates King in any way.

student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools." Reed answered affirmatively. However, at trial, Reed first testified that although the King allegations were a "factor" in the discussion of the final penalty, the "final penalty did not involve Bart King": "We discussed Bart King and the situation that took place, we did, we discussed it, but the final penalty really dealt with the letter from Mr. Flatt." When asked about his deposition testimony at trial, Reed also referred to a lack of memory in his deposition testimony and further indicated that the situation with King "was a factor in the overall penalty." The assertion that the final penalty was not based on the King allegations was reiterated by Carter and Hammond in their testimony at trial.

The district court found that the TSSAA and Carter violated Brentwood's procedural due process rights by considering *ex parte* evidence during their private deliberations on August 23, 1997. In reaching this conclusion, the district court recounted the testimony of Board of Control President Reed as well as Board members Hammond, Mickey Dunn, and Morris Rogers, all of whom indicated in their testimony that TSSAA investigators Childress and Menees provided some information to the Board regarding their findings during the private session. Additionally, the court noted that Carter testified that Carter, Meness, and Childress were all present to answer questions from the Board during the private session. The court below also pointed out that "Bart King, according to Reed, was discussed and...was a factor in the penalties imposed." *Id.* at 1004. The court credited all of this evidence "based on the demeanor of the witnesses, the consistency of the testimony, and because the testimony is adverse to the witnesses' interests as TSSAA Board of Control members." *Id.* The district court's factual finding that there was discussion during the Board of Control's

deliberations about the King allegations was not clearly erroneous and, in fact, was well-supported by the evidence. The district court was also correct in its conclusion that Brentwood Academy did not have notice that the King matter was a possible basis for final TSSAA action against Brentwood. Whether the King issue was actually a factor in the penalties ultimately imposed is far less certain. Yet the district court was entitled to credit Reed's deposition and trial testimony that the King issue influenced the Board's findings and penalties over his contrary trial testimony and other evidence that the King issue was not a basis for the penalties.[21] *See Fed. R. Civ. P.* 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."). Thus, the finding that the King issue influenced the penalties is also not clearly erroneous.

There is no applicable precedent that describes the precise process a school such as Brentwood should receive from a state athletic association such as the TSSAA before the association imposes penalties such as the ones assessed here. *Cf. Loudermill*, 470 U.S. at 545-46 (setting out the due process requirements for termination of tenured public employees); *Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (setting out the due process requirements for short-term school suspensions); *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (setting out the due process requirements for parole revocations). The district court therefore correctly looked to the general balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) to

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[21] Reed's deposition testimony is a prior inconsistent statement given under oath and also amounts to an admission against interest on the part of the TSSAA. *Fed. R. Evid.* 801(d)(1) & (2).

determine what process is due in this situation. The *Mathews* balancing test states:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The district court correctly concluded that in a situation such as the one presented by this case, due process requires that a school be informed of all of the issues relied on by an athletic association levying penalties against the school and be given a chance to respond to those issues before the penalties are imposed.[22] Such a requirement imposes only a minimal burden on the state actor and would be of great value in ensuring that a school is not wrongfully penalized. Moreover, as the district court noted, such a requirement is clearly consistent with the notification requirements set out by this court and others in analogous situations. *See, e.g., Loudermill*, 470 U.S. at 546 ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."); *Moore*, 134 F.3d at 786 ("The process offered Moore was constitutionally sufficient. She received written notice of the charges against her, as well as an explanation of the Board [of Education]'s evidence, and was offered an opportunity to present her side of the story."); *Swank v.*

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[22] OMITTED FROM TEXT.

Smart, 898 F.2d 1247, 1253 (7th Cir. 1990) ("[The police officer] was entitled to challenge the chief's assessment of the damage caused by the [incident in which the officer was seen giving a girl a ride on his motorcycle]. *Ex parte* presentation of evidence denies due process...."); *id.* at 1256 ("A tenured public employee has a constitutional entitlement to a fair hearing before being fired and that with immaterial exceptions a fair hearing includes the right to be shown the evidence on which the tribunal has relied, including evidence pertaining to the gravity of the sanction to be imposed when liability is conceded.") (citations omitted); *Newsome*, 842 F.2d at 927 (holding that student was "denied procedural due process when the superintendent disclosed to the school board, during their closed deliberations, new evidence which had not been presented during the open hearing at which Newsome and his attorney were present"); *see also Greene v. McElroy*, 360 U.S. 474, 496, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) ("Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

In sum, we affirm the district court's conclusion that the TSSAA and Carter violated Brentwood's procedural due process rights. The district court correctly determined what process was due to Brentwood: notice of the evidence relied upon in penalizing Brentwood and an opportunity to respond to that evidence before penalties were imposed. Here, the TSSAA failed to give that notice as it related to King. Brentwood therefore had no notice that it should respond to the King evidence at the hearings. Yet, the King evidence was used by the TSSAA in its deliberations and, under the district court's findings, influenced the penalties imposed on Brentwood. The failure to afford the requisite

process violated Brentwood's *Fourteenth Amendment* rights to procedural due process.

E. Availability of Qualified Immunity for Carter

The district court also held that Carter was not entitled to qualified immunity. Whether a defendant is entitled to qualified immunity is a question of law reviewed *de novo*. *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003). Qualified immunity protects government officials from civil liability for actions taken within their official discretion insofar as these actions do not violate clearly established statutory or constitutional rights of which a reasonable official would have been aware. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). It is not merely a defense to liability; rather, when applicable, qualified immunity protects government officials from lawsuits and, hence, the burdens of litigation. *See Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

The initial question here is whether the qualified immunity defense is even available to Carter, an employee of a non-profit corporation that has been found to be a state actor when engaging in regulatory activity. "In assessing whether the qualified immunity afforded state officials extends to private actors who are considered state actors under *§ 1983*, [the court] must consider both the purposes of qualified immunity protection and the nature of the relationship between the state and the putative private party." *Bartell v. Lohiser*, 215 F.3d 550, 556 (6th Cir. 2000). This court held in *Bartell* that workers for a non-profit foster-care corporation that had contracted with the government and was closely supervised by a state agency were entitled to qualified immunity. *Id.* at 557. The *Bartell* court distinguished *Richardson v. McKnight*, 521 U.S. 399, 412, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997), in which the Supreme Court held that private prison guards were not entitled to qualified immunity, as involving a for-profit

corporation that operated with limited direct supervision by the government. *See Bartell*, 215 F.3d at 556-57 (citing *Richardson*, 521 U.S. at 413). Here, one of these factors weighs in favor of Carter (because the TSSAA is a nonprofit corporation) and one weighs in favor of Brentwood (because the TSSAA operates with limited direct governmental supervision).

Nevertheless, a closer examination of *Bartell* and *Richardson* indicates that the balance is tipped towards Carter's argument that qualified immunity is available to him. Specifically, one of the key reasons qualified immunity was unavailable in *Richardson* was because the purposes of qualified immunity were already served by "marketplace pressures" that themselves "provided the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'non-arduous' employee job performance." 521 U.S. at 410. Here, there are no such marketplace pressures; the TSSAA, unlike the prison firm in *Richardson*, does not have to compete with other firms for the job it does on behalf of the state. Also, the *Richardson* court relied heavily on the fact that "history does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards." *Id.* at 404 (citing *Wyatt v. Cole*, 504 U.S. 158, 164, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992)). The district court in this case picked up on this rationale, noting that "judicial history does not reveal a firmly rooted tradition of immunity applicable to employees of private athletic associations." The notion that there would be such a "firmly rooted" history, though, is unreasonable in the first place, considering that athletic associations like the TSSAA have only recently grown in importance and stature, and litigation involving such associations has been relatively rare. *See Brentwood Acad.*, 531 U.S. at 304 ("No one...has pointed to any explosion of *§ 1983* cases against interscholastic athletic associations...."); *see also Richardson*, 521 U.S. at 414-15 (Scalia, J.,

dissenting) (chiding the *Richardson* majority for relying on the historical absence of any cases in which immunity was successfully asserted by a private prison guard). We find that qualified immunity is available to officials such as Carter.

Having found that qualified immunity is available to Carter, the next question is whether it applies in this case. If an official acts within his discretionary authority and asserts qualified immunity, the burden shifts to the plaintiff to prove that the officer violated a right so clearly established that any reasonable official in his position would have understood it was unlawful to engage in the conduct that violated the right. *See Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000). This court evaluates this burden according to a three-prong standard. *See Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999). First, the court considers whether a constitutional or statutory violation occurred. *Id.* If so, the court then considers whether the right that was violated was clearly established in the sense that a reasonable person would have known of the right. *Id.* The right must have been "clearly established at the time of the actions in question." *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996). If the right was clearly established, the court's third step is to "determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Williams*, 186 F.3d at 691.

Having found that a violation of Brentwood's procedural due process rights occurred, the next question is whether Brentwood's rights were clearly established such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. On this point, there is simply no support for the district court's conclusion that "the contours of procedural

due process were sufficiently clear and apparent that Carter had fair warning, and reasonably should have understood, that what he did violated the procedural due process rights of Brentwood Academy." As described above, there is no applicable authority describing what process state secondary athletic associations must provide when enforcing their regulations. It asks too much of Carter to expect him to have applied the *Mathews* factors and concluded that failing to give notice that the King issue would be considered and then considering it during the Board's private deliberations would violate Brentwood's due process rights. Regardless of Carter's extensive involvement in the investigation and decision making with regard to the TSSAA's penalties against Brentwood, there is no evidence that his conduct was objectively unreasonable, or that Brentwood's due process rights (or *First Amendment* rights, for that matter) in this context were clearly established. For these reasons, we reverse the district court on this issue and find that Carter is entitled to qualified immunity.

F. Antitrust Immunity

The district court ruled in an October 2002 order that the TSSAA was entitled to antitrust immunity under the doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). Brentwood appeals from this order, arguing that the doctrine does not apply and that its antitrust claim should be permitted to proceed.[23]

In addition to the facts noted earlier about the TSSAA as an organization, the following facts are pertinent to the antitrust immunity inquiry. The bulk of the TSSAA's revenues come from gate receipts at member teams'

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[23] In its brief the TSSAA argues a number of issues relating to the antitrust claim. Before the district court, however, it raised only the antitrust immunity issue, and we will therefore not consider the other issues on appeal. *See Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005).

tournaments, but member schools do pay annual dues. TSSAA employees are not paid by the state but are eligible to join the state employee retirement system. The voting membership of the Board of Control and Legislative Council (the rulemaking body of the TSSAA) are composed of school administrators, and the public school administrators who typically serve in these positions carry out their TSSAA duties during regular school hours.

The district court issued only a cursory explanation of its decision on this issue. The court explained, without analysis, that the Supreme Court's decision on "pervasive entwinement" meant that the TSSAA was a state actor "for purposes of antitrust immunity." However, while there are similarities between the two tests, the *Parker* antitrust immunity inquiry is different from the inquiry into whether state action exists for the purposes of *§ 1983* and the *Fourteenth Amendment. See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 194 n.14, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988) (noting that the two inquiries are "somewhat similar" but "by no means identical"); *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1565 n.6 (10th Cir. 1991). Indeed, the extensive case law on the issue of *Parker* antitrust immunity reveals that the doctrine does not apply to the TSSAA.

In *Parker*, the Supreme Court held that when a "state in adopting and enforcing [a regulatory] program..., as sovereign, imposed the restraint as an act of government," the program could not violate the Sherman Act, because the Act was directed against "individual and not state action." 317 U.S. at 352; *see also City of N. Olmsted v. Greater Cleveland Reg'l Transit Auth.*, 722 F.2d 1284, 1287 (6th Cir. 1983) ("[The] doctrine enunciated in *Parker* ...exempt[s] 'anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service' from Sherman Act control.")

(quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (opinion of Brennan, J.)) (emphasis removed). The Court has clarified that while *Parker* immunity clearly applies to a state legislature or a state supreme court acting in its legislative capacity, when the regulatory activity is carried out by others pursuant to state authorization, the program must meet the two-part standard set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). *See Hoover v. Ronwin*, 466 U.S. 558, 567-68, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984). "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal Aluminum*, 445 U.S. at 105 (quoting *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.)).[24] Like other judicially imposed exemptions from the antitrust laws, the *Parker* doctrine must be narrowly construed. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992).

The first question under the *Midcal Aluminum* test is whether the TSSAA acts pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. 445 U.S. at 105. This policy must be one clearly articulated in the first instance not by a state agency, *see Goldfarb v. Va. State Bar*, 421 U.S. 773, 790, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), but by "the State itself, such as a policy approved by a state legislature...or a State Supreme Court," *see S. Motor Carriers Rate Conference, Inc. v.*

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[24] In *Midcal Aluminum*, the Court held that a California price-setting system for wine met the first but not the second prong of the test, because the state simply authorized the price setting and enforced the prices established by private parties. 445 U.S. at 105. The State did not monitor market conditions or otherwise actively supervise the program. *Id.* at 105-06. Therefore, California's involvement was not sufficient to establish *Parker* immunity. *Id.*

United States, 471 U.S. 48, 63, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985) (citations omitted). The "clearly articulated" state policy requirement is not satisfied "when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive." *Cmty. Communications Co. v. City of Boulder*, 455 U.S. 40, 55, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982). In *City of Boulder*, the Court held that the *Parker* doctrine did not protect a municipality's regulation of the cable television market, even if the city's activities were authorized by a home rule statute, because the "general grant of power to enact ordinances" did not imply "state authorization to enact specific anticompetitive ordinances." *Id.* at 56. On the basis of this rationale, the TSSAA should not receive antitrust immunity. The Tennessee General Assembly has done nothing more than delegate to the State Board of Education the general authority to develop policies for the operation of public schools. *Tenn. Code Ann.* § 49-1-302. The state statute says nothing about interscholastic athletics or the TSSAA itself, which acts under the auspices of the Board. *See Brentwood Acad.*, 531 U.S. at 292-93. The Tennessee statue represents a vague, neutral authorization by the sovereign; this is not enough to establish a "clearly articulated and affirmatively expressed" state anticompetitive policy. *Midcal Aluminum*, 445 U.S. at 105; *see also Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002) ("Grants of general or neutral authority to govern local affairs will not satisfy the 'clear articulation' component of the state action exemption from antitrust liability.").

Other Supreme Court precedent, however, suggests that "'explicit authorization' by state legislatures to displace competition [is] not necessary to pass the clear articulation test. The *Parker* exemption applies as long as the suppression of competition is the foreseeable or logical result of what the state authorizes." *Id.* at 535 (citing *Town*

of Hallie v. City of Eau Claire, 471 U.S. 34, 4244, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)). In *Town of Hallie*, a city refused to supply sewage treatment facilities to those outside the city's borders. 471 U.S. at 37. The state statute did not refer to competition, but it authorized the city to refuse to provide sewage treatment to adjacent unincorporated areas unless they agreed to annexation. *Id.* at 41. The Court held that "anticompetitive effects logically would result from this broad authority to regulate" and thus the first prong of the *Midcal Aluminum* test was met. *Id.* at 42. *Town of Hallie* is distinguishable, however, since although the state statute in that case did not explicitly authorize anticompetitive state behavior, it specifically described and authorized the policy in question. Here, not only does the Tennessee statute fail to authorize anything like the recruiting rule or any other regulation, but it also fails to mention interscholastic athletics at all. The state as sovereign has not made clear its intent to establish an anticompetitive regulatory program. *Cf. S. Motor Carriers Rate Conference*, 471 U.S. at 63-64 ("The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market."); *Mich. Paytel*, 287 F.3d at 536 (holding that anticompetitive effects are "the logical and foreseeable result of the City's broad authority under state law and the Michigan Constitution to bid out public contracts for the maintenance of City prisons").

Assuming, *arguendo*, that the TSSAA acts pursuant to a "clearly articulated and affirmatively expressed" anticompetitive state policy, the next question is whether its regulatory program is actively supervised by the state. *See Midcal Aluminum*, 445 U.S. at 105.[25] This court has held

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[25] A threshold question before reaching this second prong of the test is whether the second prong applies to the TSSAA. *Town of Hallie* stands for the proposition that the active state supervision requirement is not applicable in cases where the actor is a municipality, and the Court

that the active supervision requirement must be met by state supervision; "municipal oversight" of the program is insufficient. *See Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 774 F.2d 162, 163 (6th Cir. 1985). Significantly, this court has also held that antitrust immunity does not apply to a private actor to whom authority is delegated such that the private actor becomes the "effective decision maker." *See Mich. Paytel*, 287 F.3d at 537-38. In these situations, when a private actor (such as a non-profit corporation) acts on behalf of the state but makes "'independent decisions without the input, advice, involvement, or oversight of...any...governmental body,'" antitrust immunity does not apply. *Id.* at 538 (quoting *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 481-82 (6th Cir. 1990)); *see also Town of Hallie*, 471 U.S. at 47 ("Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."). Here, authority was clearly delegated from the state to the State Board of Education and then, in turn, to the TSSAA. There is nothing at all in the record to indicate that the state is actively involved in supervising the TSSAA. In fact, the evidence suggests that the opposite is the case. *See also Midcal Aluminum*, 445 U.S. at 106 ("The national policy in favor of competition cannot be thwarted by casting such a

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suggested in dicta in that case that the same should go for cases in which the actor is a "state agency." *See 471 U.S. at 46*, 46 n.10. In their brief, defendants cite a number of cases to support their argument that the TSSAA qualifies as a political subdivision of the state for antitrust purposes and therefore need not meet the second prong of the *Midcal Aluminum* test. However, none of these cases concern an athletic association such as the TSSAA, and defendants cite no case from this circuit to support their argument. In fact, circuit precedent suggests that it is only municipalities that are exempt from the second prong of the test. *See Mich. Paytel*, 287 F.3d at 536 (holding that "private parties must establish both" elements of the *Midcal Aluminum* test).

gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.").[26]

Defendants therefore cannot establish either prong of the *Midcal Aluminum* test. For these reasons, we reverse the district court's October 2002 decision finding that the TSSAA is entitled to *Parker* antitrust immunity and remand for further proceedings with respect to Brentwood's antitrust claim.

G. Relief Issues

Brentwood also appeals the district court's denial of damages. "When *§ 1983* plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986). "Proximate causation is an essential element of a § 1983 claim for damages. That is, a violation of a federally secured right is remediable in damages only upon proof that the violation proximately caused injury." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 659 (6th Cir. 1994) (internal citation omitted). The district court found that the

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[26] The dissent rests its differing result on our decision in *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988). Based on the ruling in that case, it concludes that the TSSAA is the agent of the Tennessee Board of Education, itself a state agency, and that the TSSAA need only meet the state antitrust immunity test for state political subdivisions. The relationship between the municipality and its agent cable television company in *Consolidated*, however, is not analogous to the relationship between the Board and the TSSAA. Frankfort provided cable television service to its citizens and owned the system for providing the service, created the cable company to operate the system, and exercised continued supervisory control over the cable company — described by the court as "ultimate control." *Id.* at 358. In fact, *Consolidated* itself had previously described the cable company as an agent of the municipality, a fact which the court mentioned as *dicta* but which nevertheless appears important to the resolution. The TSSAA, with its mix of public and private membership and revenue, its elaborate internal governance and appeal structure, and its lack of state supervision does not fit within the cable company model described in *Consolidated*.

damages claimed by Brentwood (reputational harms and time spent by employees on the case) were not proximately caused by the defendants. On appeal, Brentwood argues that the district court should have considered whether the damages were "foreseeable" and that the harms suffered by Brentwood were foreseeable consequences of the defendants' conduct.

The district court rightly pointed out that any costs incurred by Brentwood as a result of the litigation were costs it chose to incur when it filed the case. As to Brentwood's reputational damage, foreseeability is an element of the proximate cause analysis, but it is distinct from the requirement that a plaintiff show the injury was directly caused by the defendant. *See Perry v. Am. Tobacco Co.*, 324 F.3d 845, 850-51 (6th Cir. 2003). It is a fundamental tort law principle that while an injury to a plaintiff might be foreseeable, the damages incurred could still be "too remote to permit recovery." *See, e.g., Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 236 (2d Cir. 1999). Here, the district court sensibly concluded that even if Brentwood's reputational harms were foreseeable, they could be traced much more directly to the media and other third-party actors than to the TSSAA or Carter.

Brentwood also argues that the district court, which enjoined the penalties assessed against Brentwood, should have also enjoined the enforcement of the recruiting rule "as applied to speech more generally." Brentwood asserts in its brief that "only a decision-forcing injunction against applying the [recruiting rule] to speech can assure TSSAA's *First-Amendment*-mandated 'careful calculation of the speech interests involved.'" These arguments are not well-taken. In its previous opinion, this court clearly rejected a facial challenge to the recruiting rule based on an argument that the regulation was invalid in all of its applications. *Brentwood Acad.*, 262 F.3d at 554-57. The court suggested that the recruiting rule could in fact be applied

constitutionally in some cases, and the district court's task on remand was to consider only whether the rule was constitutional as applied to Brentwood. *Id.* at 554-58. The district court correctly limited its remedy accordingly and enjoined only the application of the rule to Brentwood in this case.[27] We affirm the remedy granted by the district court.

III.

For the foregoing reasons, we: (1) affirm those parts of the district court's decision finding for Brentwood on its *First Amendment* and procedural due process claims and granting injunctive relief on these claims; (2) reverse the district court's decision finding for Brentwood on its substantive due process claim; (3) reverse the district court's decision finding that Carter is not entitled to qualified immunity; (4) reverse the district court's order finding that the TSSAA is entitled to antitrust immunity; and (5) remand for further proceedings on Brentwood's antitrust claim.

DISSENT BY: ROGERS

DISSENT

ROGERS, Circuit Judge, dissenting:

High school football is a game. Games have rules.

To have federal courts, under the guise of applying the enduring principles of the *First Amendment*, reverse the ordinary application of high school football recruiting rules—where the core values of the Amendment are not even remotely involved—unduly trivializes these constitutional principles. This is no more a case involving our nation's ideal of freedom of expression than a case

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[27] In its brief, Brentwood argues that the district court's injunction should also be directed at Carter in his official capacity. It is unclear why Brentwood makes this argument or why this should be the case, as the injunction enjoins all of the penalties imposed by the TSSAA against Brentwood. The injunctive relief was thus complete.

involving a coach who is thrown out of a game for talking back to a referee. This is instead a case involving game participants who challenge the discretionary administration of participation rules. Of course, good lawyers can characterize almost any perceived injustice as a constitutional case (and maybe even an antitrust case to boot), but courts should be hesitant to go along.

The Supreme Court has properly instructed us in this case that the defendant is a state actor for constitutional purposes, and this court in its 2003 decision properly determined that Brentwood Academy did not contract away all of its constitutional rights by joining TSSAA. If, for instance, TSSAA discriminated on the basis of race or religion or the expression of political views, the earlier court holdings in this case would insure the availability of federal court relief. But here TSSAA is clearly doing nothing more than administering its game rules-the game being interschool high school football. Dissatisfaction with application of game rules does not become a *First Amendment* violation merely because the rule involves speech.

Recruiting and eligibility rules are of course a very real part of the game itself, protecting the student-athlete and the brand of competition agreed to. The game of football, like any game, has rules which the competitors accept as an inherent part of participation. In addition to the basics of the game, such as how many players may participate at one time and how many points are awarded for a touchdown, competitors agree on further rules governing competition more broadly, agreeing on rules that govern how teams are grouped into leagues, how the champion of the league is determined and who is eligible to participate in a game. Fierce competition among high schools for talented student athletes, and the demand for success from fans and alumni, bring the potential for excess. As a result, athletic leagues comprised of educational institutions, such as TSSAA, have

rules governing both the recruitment of student-athletes and the eligibility of student-athletes to participate in athletic contests. Anti-recruiting rules may inhibit "speech," but so do the ordinary rules of a football game that allow players and coaches to be removed for disputing the propriety of a referee's call.

Accordingly, I dissent from those portions of the majority's decision upholding plaintiff's *First Amendment* claims. I also dissent from the finding of a due process violation and from the decision to reverse the district court's determination that there is no basis for antitrust liability in this case.[1]

I.

While the insubstantiality of plaintiff's *First Amendment* claim is clear, the complexities of modern *First Amendment* jurisprudence make it less clear precisely why the claim is not substantial. There are two parts to the answer. First, ordinary enforcement of game rules does not amount to an unconstitutional limit of free expression in part because participants agree to play in the games. Second, ordinary enforcement of game rules does not amount to an unconstitutional limit on free expression because rules (including rules limiting speech) are inherently necessary to ordered competition. Of course these two ideas substantially overlap, but they find expression in different strands of *First Amendment* law. Both strands reflect the underlying idea that rules have value for the sake of being rules, and only trench on *First Amendment* concerns when their relationship to the game is too attenuated. Enforcement of the recruitment rule in this case is clearly warranted because Brentwood agreed to general applicability of the rules (although not to rules that draw distinctions unrelated to the purpose for the rules,

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[1] I concur in Part II.C. of the majority opinion rejecting Brentwood's substantive due process claim.

such as interpretations of the rules that discriminate, for example, on the basis of political party affiliation). Enforcement of the recruitment rule in this case is also clearly warranted because, in the context of athletic competition, the rule is sufficiently related to legitimate public interests and narrowly tailored. Under each of these arguments, and certainly under at least one of the two, there is no *First Amendment* violation in this case.

I recognize that the first argument is subject to the criticism that it ignores our earlier 2001 decision and renders the extensive district court proceedings on remand an exercise in futility. In addition, the second argument is subject to the criticism that it does not adequately defer to the factual findings of the district court. While I am sympathetic with the inclinations undergirding these arguments, I cannot in the end accept that they compel us to affirm the finding that enforcement of an unexceptional athletic anti-recruiting rule violates the *First Amendment*.

A.

First of all, Brentwood agreed to comply with TSSAA anti-recruiting rules, and thus gave up its right to engage in some expressive activity otherwise protected by the *First Amendment*. That is not to say that it gave up all of its rights to engage in expressive activity vis-a-vis TSSAA. But it obviously gave up some. By comparison, a person by accepting employment by the government gives up some rights protected by the *First Amendment* (*e.g.*, the right to read the newspaper all day long), but does not give up all *First Amendment* rights (*e.g.*, the right to talk politics during a break). Brentwood in this case gave up its right to engage in certain types of speech, and may not assert such a right now. *See Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) (affirming the district court's decision not to reach the issue of whether a labor union's free speech rights had been violated where the district court had first determined that the union waived its *First Amendment* protections in a

collective bargaining agreement). Brentwood in short gave up its right to speak in violation of TSSAA's game rules (including its anti-recruiting rules) as consideration for access to TSSAA leagues and tournaments, and to benefit from TSSAA's enforcement of its rules against competitors.

1. Free Speech Rights May Be Given Up

Most individually held constitutional rights may be waived, if done knowingly, intelligently, and with sufficient awareness of relevant circumstances and likely consequences. *See Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (recognizing waiver of the constitutional right to a trial in a criminal case); *Leonard*, 12 F.3d at 88990 (upholding a contractual waiver of *First Amendment* rights where it was knowing, voluntary, and intelligent); *Erie Telecomms. v. Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988) ("constitutional rights, like rights and privileges of lesser importance, may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver").

The power to waive individually held constitutional rights extends to *First Amendment* speech-related protections. The Supreme Court has repeatedly held that contractual waivers of free speech protections may be judicially enforced. In *Snepp v. United States*, the Supreme Court held that the Central Intelligence Agency (CIA) was not barred by the *First Amendment* from enforcing an employment agreement that required CIA employees to get its permission before publishing writings about agency activities. 444 U.S. 507, 507-511, 100 S. Ct. 763, 62 L. Ed. 2d 704 (1980). The Court upheld this prior restraint on speech in part because the CIA employee in that case had voluntarily signed the employment agreement. *See id.* at 510-11. Similarly, in *Rust v. Sullivan*, the Court upheld the federal government's restriction on the abortion-related

speech of staff members working for doctors receiving Title funds. *500 U.S. 173*, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The Court upheld this restriction because it was "a consequence of [the staff members'] decision to accept employment." *Id.* at 199.

The Third, Fourth, and Ninth circuits have also honored contractual waivers of *First Amendment* rights contained in contracts with state actors. *Erie Telecomms.*, 853 F.2d at 109498 (upholding a cable company's waiver of *First Amendment* rights in a franchise agreement with a city); *Lake James Cmty. Volunteer Fire Dep't., Inc. v. Burke County*, 149 F.3d 277, 280-82 (4th Cir. 1998) (holding enforceable a Fire Department's "limited waiver" of some *First Amendment* rights in a contract with a county government); *Leonard*, 12 F.3d at 889-92 (upholding a labor union's waiver of some *First Amendment* rights to a city as provided in a collective bargaining agreement).

While these cases demonstrate that constitutional rights can be bargained away, they do not begin to cover all the possibilities. Some constitutional rights are so obviously alienable that no one would challenge the idea. To become a prison guard, a person may give up the right to be out of the prison premises for eight hours a day. To become a judge, a person may give up the right to solicit charitable contributions. To become a flight attendant, a person may give up the right to refrain from speaking before the plane takes off. And so on. Again, this is not to say that such persons give up all free expression rights, but they certainly give up some.

2. Brentwood Gave Up its Right to Certain Speech

In this case Brentwood gave up some of its free speech rights when it signed a one-year contract agreeing to abide by TSSAA's game rules, including its anti-recruiting rules. Brentwood's promise is not materially different from the CIA's employment agreement or the speech restrictions on the *Rust* staff employees. In each of these situations, the

promisors agreed not to speak in certain ways in return for something they desired.

Brentwood's waiver was doubtless knowing, voluntary, and intelligent. The anti-recruiting rule and supplemental materials explicitly forbade Coach Flatt from "contacting a student or his or her parents prior to his enrollment in the school." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 549 (6th Cir. 2001). Nothing could be clearer, and Coach Flatt did exactly this. His waiver—and his violation of this crystal clear rule—were voluntary, knowing, and intelligent. Moreover, there is no evidence on the record that would suggest that Brentwood had agreed to TSSAA's rules involuntarily or without knowledge. That Brentwood, a sophisticated and tenacious party, never contested in this appeal that it understood the anti-recruiting rules tells volumes about the intelligence of its waiver.

3. Brentwood's Waiver Has No Unconstitutional Conditions Doctrine Defect

Brentwood's waiver does not run afoul of the "unconstitutional conditions" doctrine because the anti-recruiting rules relate to participation in TSSAA athletics and Coach Flatt's recruiting letter and follow-up phone calls do not bear on matters of public concern.

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right surrendered. *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)). When the free speech rights of government employees are at issue, this doctrine prevents the surrender of speech rights only if the speech

bears on some matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). In this case the unconstitutional conditions doctrine will invalidate Brentwood's waiver only if Brentwood's membership in TSSAA has "little or no relationship" to the free speech rights surrendered (i.e., to the anti-recruiting rules); or if, applying the *Connick* standard, Coach Flatt's recruiting speech bore on a matter of public concern.

The anti-recruiting rules relate to participation in TSSAA and limit no speech on any matter of public concern. By limiting Coach Flatt's right to recruit unenrolled middle-school students for the football team, the anti-recruiting rules regulate the formation of teams that compete in TSSAA. It is an off-the-field regulation thought to enhance the quality of on-the-field competition by promoting equity in the relative strength of teams. The anti-recruiting rules, therefore, have a clear relationship, not "little or no relationship," to participation in TSSAA. Obviously, there is no reason to think that Coach Flatt's recruiting letter or follow-up phone calls touch upon any matter of public concern under *Connick*. Consequently, there is no unconstitutional conditions doctrine defect in Brentwood's agreement to comply with recruitment rules.

There is no reason to limit the *Connick* no-public-concern analysis strictly to government employee cases. *Connick* is analogous because the restriction on Brentwood's recruiting speech emanates from the necessity of limiting game participants' speech as part of the competitor-referee relationship. *Cf.* Maj. Op. at 8 (observing that lawful restrictions on government employees' speech emanate from the necessity of limiting their speech as part of the employer-employee relationship). The operation of a sports league demands speech limits that are germane to the agreed-upon venture no less than does employment. To extend an earlier analogy, a government employee harms the employer-employee relationship when he exercises his

First Amendment right to read the newspaper for his entire workday. Likewise, Coach Flatt harmed the competitor-referee relationship between Brentwood and TSSAA when he disobeyed anti-recruiting rules that others were presumably following.

Brentwood's promise to follow the anti-recruiting rules has no unconstitutional conditions doctrine defect because it has a relationship to Brentwood's participation in TSSAA and limits no speech of public concern. Brentwood's *First Amendment* claims should be dismissed.

4. Our 2001 Opinion Leaves Open the Possibility That Brentwood Gave Up Those Free Speech Rights That Might Interfere With TSSAA Game Rules

In my view, this court's 2001 opinion does not at all foreclose the foregoing argument. *Compare* Maj. Op. at 7; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 550 (6th Cir. 2001). The 2001 opinion on the contrary rejected a different and overly broad theory of waiver: that Brentwood had given up its right to sue entirely. *See id.* The 2001 opinion noted that the cases cited by TSSAA in support of this overly broad waiver theory involved parties that had explicitly "waived their right to *sue*," and concluded that "there is no comparable TSSAA provision prohibiting members from *challenging the constitutionality* of the recruiting rule." *Id.* (emphasis added). In other words, the 2001 opinion says only that Brentwood did not waive its right to sue *generally*. That is true. While retaining its right to sue generally, Brentwood waived a more limited group of rights-including any free speech-related theories that would invalidate the normal administration of rules that Brentwood agreed to, including the anti-recruiting rules. Brentwood could for instance sue on the basis of the unconstitutional conditions doctrine and indeed this court relied upon such cases in our rejection of the blanket waiver argument. *See id.*

By analogy, the staff personnel in *Rust* did not waive their right to sue about their employment conditions or free speech rights generally. Surely a court could have heard a political discrimination claim brought against the government funding authority by any such staff members. Yet the Court still held that the staff members, by accepting employment, waived *First Amendment* objections to *Title X*'s abortion-speech restrictions. *See Rust*, 500 U.S. at 199 ("employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority"). In this case, Brentwood waived only speech rights that would interfere with its agreement to abide by TSSAA's game rules and that did not violate the unconstitutional conditions doctrine.

The 2001 opinion never addressed this narrower theory of waiver and thus does not foreclose any and all arguments based on waiver. Brentwood waived its right to have Coach Flatt contact as yet unenrolled students. Its *First Amendment* claim should be dismissed on that ground.

B.

While our previous decision did not foreclose the above argument, it did direct the lower court to apply the test for content-neutral speech restrictions, and I certainly respect the majority's reluctance to disregard the district court's extensive factual inquiry. In my view, however, none of the district court's factual findings are sufficient to warrant the legal conclusion that Brentwood's *First Amendment* rights were violated by TSSAA's enforcement of the anti-recruiting rules. The very nature of game rules requires that they be somewhat arbitrary. If upon remand the district court had found a restriction on speech of a public concern, or a restriction on speech unrelated to the game of football, our review of the district court's conclusion might

support affirmance. Nothing like that was found in this case.

In this case, TSSAA's game-related legitimate interests in subordinating athletics to academics, preventing the exploitation of middle school student-athletes, and furthering competitive equality of teams, together fully justify the enforcement of the anti-recruiting rules against Brentwood. The anti-recruiting rules are reasonable time, place or manner restrictions on speech that are narrowly tailored to serve a significant government interest and leave open alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); *Tucker v. City of Fairfield*, 398 F.3d 457, 463-64 (6th Cir. 2005). The anti-recruiting rules, as applied to Coach Flatt for the spring practice letter and the follow-up phone calls, are narrowly tailored. The rule by its terms is limited to contacts "to secure or to retain a student for athletic purposes . . . ." The rule also leaves open alternative channels of communication. Coach Flatt could have distributed recruiting letters to private athletic leagues not affiliated with any school system near Brentwood's geographic area, or he could have distributed such materials to the administration of any public or private school with a request that those schools give them to students. The rule expressly endorses another alternative channel: potential students who on their own initiative contact the coaching staff seeking enrollment or financial aid information may be referred to Brentwood's principal, admissions department, guidance department, or the person in charge of financial aid.

The majority relies extensively on the required "roadmap" of our previous opinion in this case, but following that roadmap leads directly to the conclusion that there is no *First Amendment* violation. We held, in approximately one page of analysis, that the anti-recruiting rules amount to a content-neutral regulation subject to intermediate

scrutiny. 262 F.3d at 553-54 (Part D). We also held, in another page of analysis, that the district court on remand should determine if the anti-recruiting rules are narrowly tailored to meet TSSAA's substantial interests. *Id.* at 557-58 (Part F).

Repeatedly cited in those two pages are the adult entertainment ordinance case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), and the New York rock concert case of *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). Under the indisputably applicable analysis of those cases, it is not possible to find a *First Amendment* violation on the primary factual findings of the district court in this case.

The zoning ordinance at issue in *Renton* prohibited the location of adult theatres within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. 475 U.S. at 43. The Court held that the ordinance was to be evaluated under the test for content-neutral time. place, and manner restrictions on speech. *Id.* at 46-50. This is the test that we previously held to be applicable to the particular anti-recruiting rules in this case. The test is whether the ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative means of communication." *Id.* at 50. The Court upheld the ordinance, ruling that the City could rely on the experiences of other cities "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The Court rejected arguments that the ordinance was underinclusive or that it did not allow reasonable alternative means of communication.

Similar analysis compels a rejection of Brentwood's *First Amendment* claim. In *First Amendment* jargon, TSSAA is attempting to regulate the negative secondary effects of Brentwood's speech: the exploitation of middle

school athletes, the subordination of academics to athletics, and unevenly matched teams. The district court recognized the validity of these interests. 304 F. Supp. 2d at 994. TSSAA has furthered these interests by restricting communication between the coach and a student prior to enrollment, just as many cities have restricted the erotic message of dancers by keeping it away from residential areas and churches. In both cases, the negative secondary effects are controlled by restricting the time and the nature of the messages a speaker may convey. In the context of a content neutral, time, place, or manner ordinance regulating adult oriented businesses, "the *First Amendment* does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52. "*Renton* . . . does not require a 'city to demonstrate, ... with empirical data, that its ordinance will successfully lower crime', at least 'not without actual and convincing evidence from plaintiffs to the contrary.'" *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 481 (5th Cir. 2002) (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (plurality opinion)). Under *Renton*, an ordinance regulating adult oriented businesses is valid so long as a city reasonably concludes that the time, place or manner restriction will be effective in curtailing the negative secondary effects of the businesses; empirical proof that the regulation is effective in lowering prostitution or crime in the case of every establishment affected by the ordinance is not required. *See Alameda Books*, 535 U.S. at 43839.

It is not right to say that because the parents in this case were happy to receive the letter and that there was no exploitation of students or subordination of academics in this particular case, TSSAA has relied on "shoddy data or

reasoning" that does not "fairly support [its] rationale" for the enforcement of the anti-recruiting rules against Brentwood. *Compare* Maj. Op. at 15 (quoting *Alameda Books*, 535 U.S. at 438). Applied to an adult oriented business, such reasoning would allow the owner of an adult business to mount an as-applied *First Amendment* challenge to a zoning ordinance if she could show that there were no negative secondary effects, such as prostitution or crime, at *her* establishment. Such is not the state of the law. The anti-recruiting rules, like restrictions on an adult oriented business, operate in the aggregate and are judged based on the overall effect on speech; a city is not required to show that every cabaret affected by an ordinance causes an increase in crime and prostitution before the ordinance can be applied to that business. The aggregate overall increase in crime from an adult oriented business is sufficient to force the operators of those businesses to disperse or congregate. Similarly, TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rules it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics for the anti-recruiting rules to be valid. It is sufficient that, in the aggregate, contact between an authority figure such as a coach and a potential student-athlete may lead to the exploitation of student athletes or the subordination of academics to athletics to justify restricting contact between coach and potential student. All TSSAA must show is that it had a reasonable belief that contact between a coach and a prospective student had the potential for abuse in order to restrict such contact, so long as alternative avenues to communicate the message are left intact. The record here shows such a reasonable belief.[2]

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[2] The majority makes the remarkable observation that TSSAA provided no "evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest," and no evidence "explaining why competitive

Moreover, the anti-recruiting rule as applied to Brentwood is narrowly tailored and leaves Brentwood alternative channels to communicate its message. Communications not for athletic purposes are of course permitted. Moreover, had the spring practice letter been distributed to representatives of private sports leagues near Brentwood, school administrators of other schools with a request for distribution, or students who on their own had contacted appropriate Brentwood officials, there would be no violation of the anti-recruiting rules.[3]

The as-applied nature of the district court's inquiry does not require a different conclusion. A rule that precludes coach contact with not-yet-enrolled incoming students cannot be constitutional on its face if the underlying purposes of the rule have to be demonstrated every time the rule is applied in order to survive an as-applied challenge. Otherwise there would be no basis for having the rule. Just

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equity is an important value." Maj. Op. at 12. Presumably the City of Renton need not provide evidence for the obvious proposition that crime increases are against the public interest, and New York in the *Ward* case need not provide evidence that appropriate modulation of band concerts is in the public interest. Similarly, it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest.

[3] The majority opinion also discounts the interpretive commentary accompanying the anti-recruiting rules as non-binding to find that the anti-recruiting rules are not narrowly tailored and burden substantially more speech than necessary. Maj. Op. at 13. Thus, the majority avoids the fact that Brentwood was punished for behavior specifically cited as examples of conduct that would violate the anti-recruiting rules. The commentary to the anti-recruiting rules is non-binding only to the extent that TSSAA has a certain amount of discretion in enforcing the rule, and the examples cited in the interpretive commentary are a nonexclusive list. The discretion vested in TSSAA under the anti-recruiting rules is not so broad that the anti-recruiting rules, despite content neutrality, become a de facto prior restraint on speech. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (no standards for denial or grant of permit for newsrack on public property); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

as the City of Renton does not have to show ill-effects from each proposed adult theatre placement in order to enforce its rule, and just as New York in the *Ward* case does not have to show ill effects each time it requires a band to use city provided sound technicians, TSSAA does not have to show ill effects each time it punishes coach contact with not-yet-enrolled students.

This conclusion is further supported by the traditional deference given to educators in carrying out policies that affect *First Amendment* rights. This dispute arises in the context of high school education, and the courts have consistently given great deference to educators' decisions that have an impact on *First Amendment* rights. The Supreme Court has recognized the "important, delicate, and highly discretionary functions" that the educational system undertakes, and emphasized a consistent concern for "the need [to] affirm the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). As this court has stated, "In the *First Amendment* arena . . . the Supreme Court . . . has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission and in developing a reasonable fit between the ends and means of their policies." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005). While not a public school, TSSAA is a part of the educational system that regulates what both parties concede is an important part of the high school experience. TSSAA should enjoy greater latitude in fashioning and applying recruiting rules that prescribe and control the conduct of overzealous coaches to further its educational mission, consistent with fundamental constitutional safeguards.

The Supreme Court and our court have both recognized that the federal courts are ill-equipped to regulate high

school education. "It long has been the case that constitutional claims generally receive less rigorous review in the secondary and middle school setting than they do in other settings." *Id.* Federal courts are even less well-equipped to regulate high school athletics.

Finally, I note the "Catch-22" implication of the argument that the particular application of the anti-recruiting rules violated the *First Amendment* in this case. By prohibiting all communication between coaches and un-enrolled students, the regulation is more rigorously content neutral. The more the prohibition is "tailored," for instance by permitting some types of communication but not others, the less content neutral it becomes. An attack on the particular application of the no-communication rule thus gives TSSAA the Hobson's choice of (1) making the prohibition more content specific, thereby coming closer to treading on *First Amendment* values, or (2) discarding the rule-not required if the rule is facially valid.

II.

Brentwood's procedural due process rights were not violated because the presentation of *ex parte* evidence, if any, did not affect TSSAA's final decision.

Based on TSSAA's written decision and the testimony at trial, the district court clearly erred in determining that the TSSAA Board of Control heard *ex parte* evidence related to Bart King during its deliberations following Brentwood's final hearing, and that the allegations regarding Mr. King were a basis for the penalty imposed. The only support for the district court's finding that the King allegations were a basis for Brentwood's punishment are two statements by TSSAA Board of Control President Mike Reed. In his deposition, Mr. Reed stated that the King allegation was one of the reasons Brentwood was found to have violated the anti-recruiting rules. At trial, Mr. Reed disclaimed his deposition testimony, stating that Brentwood's final penalty was due to Coach Flatt's letter rather than Mr. King's

activities. He went on to state that the Bart King allegations were a "factor" in "what was going on and so forth," interrupting Brentwood's counsel before the follow up question was finished.

With all due respect to the district court's better position to judge the credibility and demeanor of witnesses, the district court clearly erred in determining that Mr. Reed's single statement at deposition was sufficient to show that *ex parte* evidence was presented to the Board of Control and formed a basis for the penalty imposed on Brentwood. Michael Hammond and Ronnie Carter, in addition to Mr. Reed, testified that the King allegations were not a basis for the final penalty. Mr. Hammond further indicated that the discussion of the King allegations during the Board of Control's private deliberations was superficial. Gene Meness and Bernard Childress, the TSSAA investigators who looked into the King allegations, could not recall answering any question from the Board of Control related to Mr. King. Indeed, it is unclear what evidence they could have presented given that they did not interview Mr. King and the investigation consisted of a series of letters between Brentwood's headmaster and TSSAA. In short, other than a single statement in a lengthy deposition, there is no evidence that TSSAA based its final penalty on *ex parte* evidence related to Bart King and the district court clearly erred in resting the entire weight of its finding that Brentwood's procedural due process rights were violated on so slender an evidentiary reed.

III.

Finally, the fact that TSSAA has been granted state authority to regulate athletic competition requires us to affirm the district court's conclusion that state antitrust immunity applies in this case. TSSAA is entitled to state antitrust immunity because, as an agent of the Tennessee Board of Education (the Board), TSSAA partakes of the Board's state authorization to displace competition. TSSAA

has done so using foreseeable means pursuant to clearly articulated Tennessee policy. As a result, TSSAA satisfies the applicable test for state antitrust immunity designed for municipalities and state political subdivisions. I would therefore affirm the decision of the district court granting summary judgment in favor of the TSSAA on Brentwood's antitrust claims based on state antitrust immunity.

A. TSSAA is the Tennessee State Board of Education's Agent

TSSAA is an agent of the Board and, as such, receives state antitrust immunity if it satisfies the test for municipalities or state political subdivisions. Our ruling in *Consolidated Television Cable Service, Inc. v. City of Frankfort* indicates that TSSAA is an agent of the Board. 857 F.2d 354 (6th Cir. 1988). In that antitrust suit, we held that a municipal cable television corporation (that obviously was not itself a city) was an agent of the City of Frankfort and thus should receive state antitrust immunity if it satisfied the test for municipalities. *Id.* at 358-60. We classified the corporation as the City's agent because the City exercised "ultimate control" over the corporation. *Id.* at 359.

More specifically, the City had "ultimate control" over the corporation because (1) it was a municipal corporation; (2) the corporation's form and method had been dictated by the City; (3) the corporation existed at the City's pleasure; (4) and the City appointed one half of the corporation's board of directors. *See Consolidated*, 857 F.2d at 358-59.

Analogously, the Board exercises "ultimate control" over TSSAA. The Board enjoys ultimate control over TSSAA because the Board delegated to TSSAA all of TSSAA's regulatory powers and therefore can revoke its authority at any time. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 67981 (M.D. Tenn. 1998). The Board wields a general power to review, approve, or reaffirm the content of TSSAA's

regulations. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 292-93, 299-301, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). At its whim, the Board can revoke any TSSAA rule it dislikes. *See id.* The Board's review power implicitly disciplines TSSAA. *See id.* Moreover, the Board's chairman has power to designate a person or persons to serve in an ex-officio capacity on TSSAA's governing bodies. *Id.* at 292. The Board may thus directly influence TSSAA's most minute decisions by populating its decision-making bodies with people of its selection. The Board's complete dominion over TSSAA is "ultimate control" under *Consolidated*, making TSSAA the Board's agent.

B. The State Antitrust Immunity Test for Municipalities and State Political Subdivisions Applies to TSSAA's Allegedly Anticompetitive Conduct

Because TSSAA is the Board's agent, and the Board is a state agency, TSSAA need only satisfy the state antitrust immunity test for municipalities or state political subdivisions, not the more stringent test for private actors. *See Consolidated*, 857 F.2d at 359-62 (applying the test for municipalities to an agent of a municipality). In *Consolidated* we read *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985), clearly to hold that the requirement of "active supervision" applied "only when the actor is a private party rather than a municipality." *Consolidated*, 857 F.2d at 360. The test for municipalities and state political subdivisions allows TSSAA to act anti-competitively pursuant to "clear articulation of a state policy to authorize anticompetitive conduct." *See Town of Hallie*, 471 U.S. at 40-42 (internal quotation omitted). Tennessee law need not explicitly demand or permit displacement of competition. *See id.* at 41-42. The anticompetitive conduct need only be the "foreseeable result" of state authorization. *Id.* at 42.

C. Tennessee's Policy to Displace Competition in Interscholastic Athletics is Evident in Its Broad Grant of Authority to Regulate Interscholastic Athletics

Tennessee's policy to displace competition in interscholastic sports may be inferred from its grant of authority to the Board. As the Supreme Court has noted, Tennessee law vests in the Board wide-ranging authority to regulate primary and secondary education. See *Brentwood Acad.*, 531 U.S. at 292 (citing *TENN. CODE ANN.* § 49-1-302). Section 49-1-302 grants broad powers that include the authority to regulate athletics programs; this section further serves as the basis for TSSAA's status as the agency responsible for regulating interscholastic school sports in Tennessee. *See id.* Under the Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising*, such broad authority to set restrictions on competitive endeavors makes evident the state's policy to displace competition. *See* 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

In *Omni*, the Supreme Court held that state antitrust immunity applied to a city that had used its state-granted zoning authority to restrict billboard construction. *See id.* at 368-79. In holding that state delegation of zoning authority to a city evinces a state policy to displace competition, the Court said: "The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers." *Id.* at 373. Consequently, the mere delegation of zoning authority to the city adequately evinced a state policy to displace competition.

In this case, the delegation to TSSAA of comprehensive power to regulate interscholastic athletics is the equivalent

of the city's grant of zoning authority in *Omni*. Just as the exercise of zoning authority in *Omni* stopped a company from competing in the billboard construction market, TSSAA's anti-recruiting rules restrict schools' efforts to build their best teams by wooing talented players with scholarships or perquisites. In a broader sense, also, TSSAA's potential efforts to determine the venues of games, what teams will face each other, the grouping of schools into divisions, the dates of the athletic seasons or pre-seasons, and any number of other restrictions run the risk of "preventing normal acts of competition" in a manner analogous to the zoning authority in *Omni*. Such regulations are a "foreseeable result" of Tennessee's decision to authorize the statewide regulation of interscholastic sports.

The Supreme Court has impliedly acknowledged the inherent need for rules that "prevent normal acts of competition" in the football context. The Court has written regarding the National Collegiate Athletic Association (NCAA):

> What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football.

NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-102, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). These

sorts of restrictions, and their anticompetitive effects, are no less foreseeable here.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY
PLAINTIFF-APPELLEE / CROSS-APPELLANT,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET. AL.,
DEFENDANTS-APPELLANTS / CROSS-APPELLEES.

NO. 03-5245/5278.

[FILED]
[JUNE 27, 2006]
[LEONARD GREEN, CLERK]

Before GIBBONS and ROGERS, Circuit Judges;
and BELL, *District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission

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* Hon. Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

and decision of the cases. Accordingly, the petition is denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT.

/s/Leonard Green
Leonard Green
Clerk

CONSTITUTION

* * *

ARTICLE V
Executive Director

Section 1. The Executive Director shall be elected for a term of three years by the Board of Control.

Section 2. Under the direction of the Board of Control the Executive Director shall receive, hold, expand and account for all funds of the Association.

Section 3. He shall maintain the records and property of the Association.

Section 4. He shall initiate investigations, conduct hearings, collect information, render decisions and fix penalties based on the evidence, and in accordance with the rules and regulations of the TSSAA. Such decisions shall be subject to review by the Board of Control on appeal by the principal of the member school involved.

Section 5. He shall attend all meetings and serve as secretary of the Board of Control, and of the Legislative Council.

Section 6. He shall be an ex-officio member of all committees of the Board of Control and of the Legislative Council.

Section 7. He shall administer the rules and regulations governing the certification of officials as directed by the Board of Control.

ARTICLE VI
Hearings

Section 1. Any school charged with violating TSSAA regulations shall be notified of such charges by the Executive Director. If a hearing is desired by the school involved, the Executive Director must be notified immediately in writing. Provisions will then be made for such hearing, and the school so notified.

Section 2. A member school shall not be suspended from membership without first being given the opportunity to present its case at a hearing. Hearings shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control who represent the Grand Division of the State in which the school is located, and who shall act in an advisory capacity. After testimony has been heard, the Executive Director shall meet in the executive session with the members of the Board of Control who are present at the hearing. After discussing with the Board members the evidence and possible penalties, the Executive Director shall decide what penalty, if any, is to be placed against the school.

Section 3. Any decision of the Executive Director may be appealed to the Board of Control. If the decision of the Executive Director is sustained, the school making the appeal shall defray the expenses for the meeting of the Board of Control in case a special meeting of the Board is called to consider the appeal.

Section 4. No member of the Board of Control shall serve on the Board while a case involving the school which he represents is being heard.

* * *

Constitution

1.

Q. How are members of the Board of Control and Legislative Council selected?

A. Members of the Board of Control and of the Legislative Council are selected at the annual regional meetings in the fall. Each school represented has one vote. The East Tennessee meeting is held in Knoxville, Middle Tennessee in Nashville, and West Tennessee In Jackson.

2.

Q. How may a school charged with violating TSSAA regulations present its case?

A. The principal of the school may request the Executive Director to call a hearing in regard to the charges. Such a hearing is held before the Executive Director and two or more Board of Control members representing the Grand Division of the state in which the school is located.

3.

Q. May a decision made by the Executive Director be appealed to the Board of Control?

A. Yes.

4.

Q. What procedure is followed by a school that wishes to appeal to the Board of Control a decision of the Executive Director?

A. The school principal should notify the Executive Director in writing that the principal wants the Board of Control to review the case. If it is satisfactory to hold the review of the case at the next regular meeting of the Board of Control, it will be listed on the agenda. If the case is of such nature that the school wants immediate action, the principal should so indicate. The Executive Director will then communicate with the president of the Board who will call a special session to consider the case. When such a special session of the Board is called, the school requesting the special session shall pay all expenses of the meeting in the event the Board of Control sustains the decisions of the Executive Director.

5.

Q. Does the Executive Director have a vote on matters that are presented to the Board of Control?

A. No. The Executive Director is not a member of the Board of Control and therefore can have no vote on matters being considered by it.

6.

Q. May a member of the Board vote on a matter involving the school which he represents.?

A. No. A member of the Board of Control cannot sit in on a case involving his or her own school.

7.

Q. How may a member school submit a proposal to amend the Constitution or to change the Bylaws?

A. By putting the suggested change in writing and filing it with the Executive Director no later than October 15 preceding the December meeting of the Legislative Council.

* * *

TSSAA ByLaws

ARTICLE I

Membership

Section 1. Secondary schools (also junior high schools) in the state, which are approved by the State Department of Education. State Department of Education approved agencies and/or The Southern Association of Colleges and Schools, both private and public, desiring membership in TSSAA may make application to the Board of Control. Applications for membership shall be approved or rejected by the Board of Control.

Member schools that withdraw from the TSSAA membership must be an affiliate member for one year upon application to renew membership.

Section 2. There shall be two divisions for athletic competition – the Senior High Division and the Junior High Division.

Schools which include grades 7-12, 8-12, 9-12 and 10-12 may compete in the Senior High Division. Schools in transition, if they do desire, may compete in the Senior High Division after the tenth grade has been added.

Schools which include grades 7, 8, 9; grades 8 and 9; or grades 9 may compete in the Junior High Division. (It will, therefore, be possible for some schools to compete in both the senior and the junior high divisions, while other schools will be able to compete in only one of the divisions. Even though the school may participate in both divisions it will hold only one membership in TSSAA.)

Schools with grades 7, 8, 9; grades 8 and 9 or grades 9 may compete in senior high division against senior high division "B" teams in regular season contests and "B" team individual tournaments provided they use 8th and 9th grade students only.

Section 3. The annual dues for a senior high school in Class A shall be $150.00, in Class AA $200.00, in Class AAA $250.00 and for a junior high school shall be $100.00. The TSSAA Legislative Council may not increase membership dues unless the increase is approved by a vote of TSSAA member schools.

Membership dues shall be paid in advance and shall be for the calendar year.

Section 4. Membership expires at midnight on December 31 of each year. Schools failing to renew membership before January 1 shall be charged a penalty of $25.00. The Executive Director shall notify by registered letter the principal of any school that has not renewed membership by January 1, and advise the principal that unless the membership fee and the penalty is filed immediately that the school will be dropped from the list of member schools.

Financial Statement

Section 5. The fiscal year of the Association shall be from July 1 to June 30. At the close of the fiscal year, the Executive Director shall publish a financial statement. All surplus funds shall be used as directed by the Board of Control.

Suspension

Section 6. The Executive Director and/or the Board of Control shall have power to suspend, to fine, or otherwise penalize any member school for the violation of any of the rules of the Association or for other just cause. The period of suspension or other penalty shall be left to the discretion of the Board of Control where the penalty is not fixed.

Section 7. Any school under suspension, if it has restricted its athletic program to intramural athletics for the period of suspension, may be reinstated by the Board of Control upon application made in writing, twenty days in advance of the time it desires to be reinstated, to the Executive Director by the principal of the school and by the Board of Education under which the school operates. The Executive Director shall present the application of the suspended school to the Board of Control for its consideration. The principal and the Board of Education shall agree in writing that the school will abide by all rules of the Association in the future. The principal and each member of the Board of Education shall sign the statement.

Section 8. If a school with one or more two-year contracts has its athletic program in any sport suspended for violation of TSSAA regulations and the first game of the two-year contract has played at the offending school such school shall be required to complete the contract, or contracts, when it resumes its athletic program if the school, or schools, affected desire.

Section 9. Suspension of a member school shall free all existing contracts between that school and other member schools.

Section 10. An attempt by a member school to permit a player to participate who has been declared ineligible by TSSAA shall free all existing contracts between that school and other member schools.

Section 11. Contracts made and entered into by member schools may be cancelled by mutual agreement or by authority of the Board of Control. All contracts between two schools shall be signed by the principals contracting.

Sponsored Sports

Section 12. TSSAA shall sponsor the following sports: baseball, girls' softball, basketball, cross country, football, golf, tennis, track, girls' volleyball, soccer and wrestling.

Cooperative Programs

Section 13. Two schools may petition TSSAA for permission to have a cooperative program in team sports (football, volleyball, basketball, baseball, softball, and soccer) if one of the schools does not have that program or has not had that program for the last five years. Only schools with the same grade configuration may combine to form a team and schools may co-op with only one other school (a maximum of two schools may combine to form a team). The Executive Director of TSSAA may approve such co-op programs subject to approval by principal of schools involved, School Board of schools involved, and the TSSAA Board of Control. When a co-op program has been formed between schools it must be re-evaluated after one year and subject to approval by the Executive Director.

ARTICLE II – Eligibility Rules

The member high schools of the Tennessee Secondary School Athletic Association have adopted, through their elected representatives, an essential inter-related group of minimum eligibility requirements which establish the threshold for participation for all students within the interscholastic program and which work together to define and preserve the fundamental nature

* * *

Recruiting Rule

Section 21. The use of undue influence on a student (with or without an athletic record), his or her parents or

guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

1.

Q. How is undue influence interpreted in the recruiting role?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting role?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3

days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.)

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines For Understanding The "Recruiting Rule"
and
Understanding "What Is Undue Influence?"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year old students in

the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

* * *